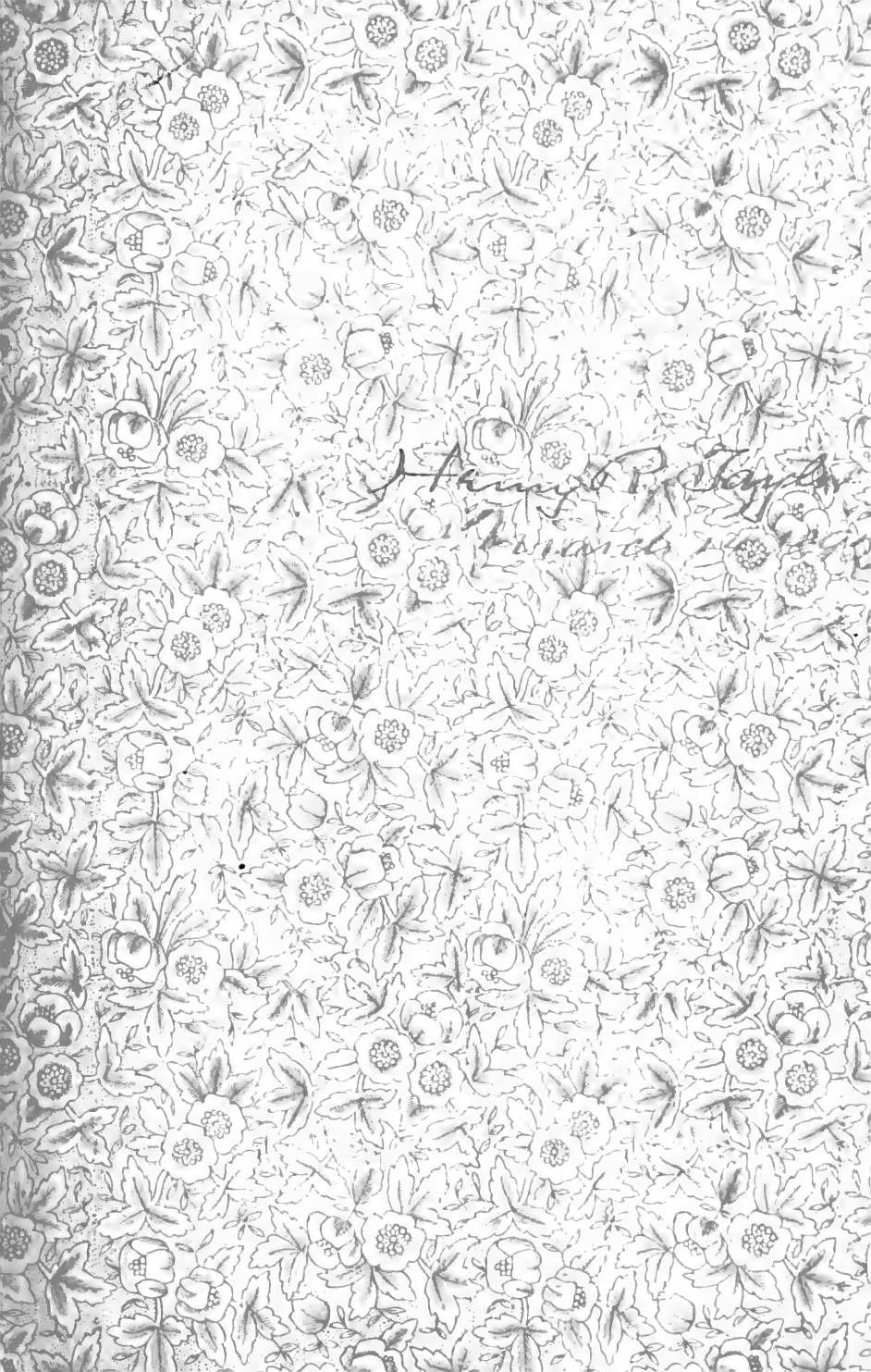

THE BEHRING SEA CONTROVERSY

BY

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PREFACE

A part of this book has had a prior existence in the form of a pamphlet, called "The Behring Sea Dispute," printed in the spring of 1890 for private circulation. While the substance of that pamphlet is retained in the following pages, a large amplification has been rendered necessary by the growth of the subject. At that time the diplomatic correspondence had not yet been published which frames the issues in this controversy between Great Britain and the United States and presents the arguments on behalf of the United States as formulated by Mr. Blaine. It was first made public in this country in two messages from the President to the House of Representatives, dated respectively July 23, 1890, and January 5, 1891. The presentation of later correspondence to Parliament, and the newspaper file, have enabled me to bring the subject down to date of February 11, 1892.

59 Wall Street, N. Y., March 1, 1892.

S. B. S.

CONTENTS

THE BEHRING SEA CONTROVERSY.

CHAPTER I.

Seizures and Negotiations.

To "a sea which lies far beyond the line of trade, whose silent waters were never cloven by a commercial prow, whose uninhabited shores have no port of entry and could never be approached on a lawful errand under any other flag than that of the United States,"[1] our eyes, in these pages, will be turned. Here is the summer home of the seal,—the last and greatest seal rookery of the world. "Into this peaceful and secluded field of labor, whose benefits were so equitably shared by the native Aleuts of the Pribylov Islands, by the United States, and by England, certain Canadian vessels in 1886 asserted their right to enter, and by their ruthless course to destroy the fisheries and with them to destroy also the resulting industries which are so valuable. The Government of the United States at once proceeded to check this movement, which, unchecked, was sure to do great and irreparable harm. * * *

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1 Let. Mr. Blaine to Sir Julian Pauncefote, Dec. 17, 1890–1891. This and the succeeding references to which 1891 is added, refer to the President's message of Jan. 5, 1891, 51st Cong., 2d Sess., House of Representatives Ex. Doc., No. 144.

"Whence did the ships of Canada derive the right to do in 1886 that which they had refrained from doing for more than ninety years? Upon what grounds did Her Majesty's Government defend in the year 1886 a course of conduct in the Behring Sea which she had carefully avoided ever since the discovery of that sea? By what reasoning did Her Majesty's Government conclude that an act may be committed with impunity against the rights of the United States which had never been attempted against the same rights when held by the Russian Empire."[1]

These words of Mr. Blaine present the grievance of the United States against the depredations of British vessels in Behring Sea.

A fever of popular excitement lends to the weakest national claim an apparent, yet unreal, strength. Only by allaying this fever can we rightly detect the real strength underneath. Like all controversies respecting the national domain, the Behring Sea dispute has called forth an abundance of bluster. A claim asserted by the Government of the United States, but uncertainly at first, has been borne aloft on the shoulders of its people into a position of dangerous prominence. Only by laying aside all prejudices, particularly the patriotic, and examining this controversy in the cold, clear light which international law and history shed upon it, can we hope to gain a correct view of its merits.

U. S. Revised Statutes.—"Section 1954. The laws of the United States relating to customs, commerce and

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1 No. 9, 1890. Let. Blaine-Pauncefote, Jan. 22, 1890. This and the succeeding references given by number to which 1890 is added, refer to the President's message of July 23, 1890, 51st Cong., 1st Sess., House of Representatives Ex. Doc. No. 450.

navigation, are extended to and over all the main-land, islands, and waters of the Territory ceded to the United States by the Emperor of Russia by treaty concluded at Washington on the thirtieth day of March A. D. one thousand eight hundred and sixty-seven, so far as the same may be applicable thereto."

"SEC. 1956. No person shall kill any otter, mink, marten, sable, or fur-seal, or other fur-bearing animal within the limits of Alaska Territory, or in the waters thereof. * * *

"SEC. 1057. * * * The collector and deputy collectors appointed for Alaska Territory, and any person authorized in writing by either of them, or by the Secretary of the Treasury, shall have power to arrest persons and seize vessels and merchandise liable to fines, penalties or forfeitures under this and the other laws extended over the Territory * *."

Such were the laws which first apprised the world that the United States had stretched over the Behring Sea the iron hand of dominion. They were enacted July 1st, 1870, immediately after the cession of Alaska.

The vague term in these laws, "Alaska Territory, or in the waters thereof," remained for a time unfocused. It did not at first give rise to a claim of more than ordinary maritime jurisdiction, as is evident from the following incident. In 1872 Mr. Phelps,[1] collector of the Port of San Francisco, reported to the Secretary of the Treasury that expeditions were being organized in Australia and the Hawaiian Islands to capture seals on their annual

1 Enclosure No. 156. Let. to Mr. Boutwell, Sec. of Treas., March 25, 1872. This and the succeeding references given by number refer to the President's Message of Feb. 12, 1889, 50 Cong., 2d Sess., Sen. Ex. Doc. No. 106.

migration to the Seal Islands of St. Paul and St. George. He recommended that a revenue-cutter be sent to prevent this. But Sec. Boutwell's reply was: "I do not see that the United States would have the jurisdiction or power to drive off parties going up there for that purpose, unless they made such attempts within a marine league of the shore." [1]

1881, however, seems to mark the change of opinion on this point. The occurrence in that year of similar expeditions prompted Collector D. A. D'Ancona to request from the Treasury Department more accurate information as to the meaning of the above laws. The interpretation now put upon them by the Department was as follows:

"You inquire in regard to the interpretation of the terms 'waters thereof' and 'waters adjacent thereto' as used in the law, and how far the jurisdiction of the United States is to be understood as extending.

"Presuming your inquiry to relate more especially to the waters of Western Alaska, you are informed that the treaty with Russia of March 30, 1870, by which the Territory of Alaska was ceded to the United States, defines the boundary of the Territory so ceded. * * *

"* * * All the waters within that boundary, to the western end of the Aleutian Archipelago and chain of islands, are considered as comprised within the waters of Alaska Territory. All the penalties prescribed by law against the killing of fur-bearing animals would therefore attach against any violation of law within the limits before described." [2]

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[1] No. 56. Letter to Mr. Phelps, April 19, 1872.

[2] No. 212. Treas. Regs. Let. of Acting-Sec. French to Mr. D'Ancona, March 12, 1881.

In 1886 this ruling was affirmed by Secretary Manning in a letter [1] to Collector Hagan :

"TREASURY DEPARTMENT,

"March 6, 1886.

"*Sir.*—I transmit herewith for your information a copy of a letter addressed by the Department on the 12th March, 1881, to D. A. D'Ancona, concerning the Jurisdiction of the United States in the waters of the Territory of Alaska and the prevention of the killing of fur seals and other fur-bearing animals within such areas as prescribed by chapter 3, title 23, of the Revised Statutes. The attention of your predecessor in office was called to the subject on the 4th April, 1881. This communication is addressed to you, inasmuch as it is understood that certain parties at your port contemplate the fitting out of expeditions to kill fur seals in these waters. You are requested to give due publicity to such letters, in order that such parties may be informed of the construction placed by this Department upon the provision of law referred to.

"Respectfully yours,

"D. MANNING,

"Secretary."

But as yet no captures had been made.[2] British Columbian sealers in Alaskan waters remained unmolested so late as 1885 ; and this, although spoken by American revenue-cutters. In the spring of 1886 a

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1 No. 156.

2 No. 12. Let. Mr. Bayard to Sir L. S. S. West, April 12, 1887 ; No. 117. Let. Lord Lansdowne to Mr. Stanhope, Nov. 29, 1886.

large fleet prepared for the coming seal fishing season in Behring Sea.[1]

In August, however, of that year, the United States cruiser *Corwin*, acting under instructions from the Treasury Department, seized, at a distance of 115, 45 and 70 miles respectively from the island of St. George, the British Columbia seal-schooners, *Onward*, *Carolena* and *Thornton*. They were taken into Sitka, confiscated and condemned to be sold.

The libel of information of the United States District Attorney for Alaska against these vessels declared them "forfeit to the use of the United States" on the ground of being "found engaged in killing fur seals within the limits of Alaska Territory and in the waters thereof in violation of section 1956 of the Revised Statutes of the United States."[2]

The brief for the defendants, on the other hand, contained the following argument:

"The first question then to be decided is what is meant by the waters thereof. If the defendants are bound by the treaty between the United States and Russia ceding Alaska to the United States, then it appears that Russia in 1822 claimed absolute territorial sovereignty over the Behring Sea, and purported to convey practically one-half of that sea to the United States. But are the defendants, as men belonging to a country on friendly terms with the United States, bound by this assertion of Russia? And can the United States claim that the treaty conveys to them any greater right than Russia herself possessed in these waters? In other words, the mere assertion of a right

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[1] No. 156. Let. Mr. Lubbe to Mr. Baker, March 30, 1886.

[2] No. 14. U. S. *vs.* The Carolena, &c.

contrary to the comity of nations can confer on the grantees no rights in excess of those recognized by the laws of nations.

"It also appears that the United States in claiming sovereignty over the Behring Sea is claiming something beyond the well-recognized law of nations, and bases her claim upon the pretensions of Russia, which were successfully repudiated by both Great Britain and the United States. A treaty is valid and binding between the parties to it, but it cannot affect others who are not parties to it. It is an agreement between nations, and would be construed in law like an agreement between individuals. Great Britain was no party to it and therefore is not bound by its terms." [1]

Judge Dawson, after quoting the first article of the Alaska cession treaty, charged the jury:

"All the waters within the boundary set forth in this treaty to the western end of the Aleutian archipelago and chain of islands are to be considered as comprised within the waters of Alaska, and all the penalties prescribed by law against the killing of fur-bearing animals must, therefore, attach against any violation of law within the limits heretofore described.

"If, therefore, the jury believe from the evidence that the defendants by themselves or in conjunction with others did, on or about the time charged in the information, kill any otter, mink, marten, sable, or fur-seal, or other fur-bearing animal or animals, on the shores of Alaska or in the Behring Sea, east of the 193d degree of west longitude, the jury should find the defendants guilty." [2]

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[1] No. 156.
[2] No. 14.

The British Minister at Washington, Sir L. S. Sackville West, immediately made formal protest in the name of Her Majesty's Government against these seizures.[1] Whereupon the following despatch was sent by the Attorney-General to Judge Dawson and the U. S. District Attorney at Sitka:

"I am directed by the President to instruct you to discontinue any further proceedings in the matter of the seizure of the British vessels *Carolina*, *Onward* and *Thornton*, and discharge all vessels now held under such seizure and release all persons that may be under arrest in connection therewith."

That the execution of this order was delayed until its repetition in the following autumn,[2] must be attributed, not to any bad faith on the part of this government, but solely to the fact that its authenticity was suspected by those to whom it was directed.[3]

Secretary Bayard, in communicating to Sir L. S. S. West the above order, hastened to assure him that this action was taken "without conclusion at this time of any questions which may be found to be involved in these cases of seizure."[4] He steadily refused to give any assurance of the discontinuance of such seizures. In answer to an inquiry of Sir L. S. S. West, as to whether vessels fitting out for the approaching fishing season in Behring Sea might rely on being unmolested by the cruisers of the United States when not near land,[5] he wrote:

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1 No. 2. Let. to Mr. Bayard, Oct. 21, 1886.
2 No. 24. Let. Mr. Garland to Mr. Bayard, Oct. 12, 1887.
3 Telegram of Oct. 12, 1887; id.
4 No. 9. Let. Mr. Bayard to Sir L. S. S. West, Feb. 3, 1887.
5 No. 11. April 4, 1887.

"The question of instructions to Government vessels in regard to preventing the indiscriminate killing of fur-seals is now being considered, and I will inform you at the earliest day possible what has been decided,. so that British and other vessels, visiting the waters in question, can govern themselves accordingly."[1]

And when later informed that "Her Majesty's Government had assumed that, pending the conclusion of discussions between the two governments on general questions involved, no further seizures would be made by order of the United States Government,"[2] he promptly denied ever saying anything to justify such an assumption, but declared that "having no reason to anticipate any other seizures, nothing was said in relation to the possibility of such an occurrence."[3]

Here the matter might have ended, but fresh seizures now re-opened the healing trouble. All through July and August of 1887, the events of the preceding year were repeated. During those two months, the U. S. revenue-cutter *Richard Rush* captured the British Columbian fishing schooners *W. P. Sayward*, 59 miles; *Dolphin*, 40 miles; *Grace*, 96 miles; and *Anna Beck*, 66 miles from Oonalaska Island; and the *Alfred Adams*, 60 miles from the nearest land.

Formal protest was again entered by the British Minister at Washington.[4] An opportunity was given the owners of these vessels to release them on appeal bonds.[5] But owing to a failure of the proctors to take

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1 No. 12. April 12, 1887.

2 No. 15. Sir L. S. S. West to Mr. Bayard, August 11, 1887.

3 Let. to Sir L. S. S. West, Aug. 13, 1887.

4 No. 23. Lets. Sir L. S. S. West to Mr. Bayard, Oct. 12 and 19, 1887.

5 Let. Mr. Garland to Mr. Bayard, March 9, 1888.

an appeal within the prescribed time, this privilege was lost to four of the vessels [1] and the decrees of condemnation became final.[2] These four vessels were the *Anna Beck*, *Dolphin*, *Grace* and *Ada*. At the request of the British Government,[3] their sale was postponed, and bonds ordered to be received in lieu of the vessels until the legality of their seizure could be investigated.[4] No advantage, however, was taken of this offer to bond, and their value, while lying at Port Townsend in the custody of the marshal, depreciated so rapidly that a total loss was feared.[5] Accordingly, and, in the case of the *Grace* and *Dolphin*, at the express wish of the owner,[6] these schooners were, on the 14th of November, 1888, ordered to be sold.[7]

The Act of Congress, approved March 2, 1889, cannot be regarded as adding anything to the history of these events. It simply declared [8] that Sect. 1956 of the Revised Statutes, already given, includes and applies to "all the dominions of the United States in the waters of the Behring Sea." But as it does not further define what "these dominions" are, it begs the question.

It also lays upon the President the duty of making an annual proclamation accordingly. In pursuance whereof, President Harrison, on March 22d, warned "all persons against entering the waters of the Behring Sea

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1 No. 46. Let. of Sir L. S. S. West to Mr. Bayard, Aug. 6, 1888.

2 No. 45. Let. Mr. Garland to Mr. Bayard, May 31, 1888; No. 42. Let. Sir L. S. S. West to Mr. Bayard, May 28, 1888.

3 No. 46. Let. Sir L. S. S. West to Mr. Bayard, Aug. 6, 1888.

4 No. 49. Let. Mr. Jenks to Mr. Bayard, Aug. 10, 1888.

5 No. 59. Let. Mr. Garland to Mr. Bayard, Oct. 20, 1888.

6 No. 52. Let. Mr. Atkins to Mr. Garland, Aug. 25, 1888.

7 No. 61. Let. Mr. Garland to Mr. Bayard, Nov. 14, 1888.

8 3d section.

within the dominion of the United States," &c. But this expression is equally unenlightening.

Already, pending these difficulties, negotiations for their international settlement had been begun. On August 19, 1887, Secretary Bayard sent circular letters to the U. S. legations in England, Germany, France, Japan, Russia and Norway and Sweden. The situation was thus described:

"Recent occurrences have drawn the attention of this Department to the necessity of taking steps for the better protection of the fur-seal fisheries in Behring Sea.

"Without raising any question as to the exceptional measures which the peculiar character of the property in question might justify this Government in taking, and without reference to any exceptional marine jurisdiction that might properly be claimed for that end, it is deemed advisable—and I am instructed by the President so to inform you—to attain the desired ends by international co-operation."

Thereupon the respective ministers to those countries were "instructed to draw the attention of the Government to which" they were "accredited, to the subject, and to invite it to enter into such an arrangement with the Government of the United States as will prevent the citizens of either country from killing seal in Behring Sea at such times and places, and by such methods as at present are pursued, and which threaten the speedy extermination of those animals and consequent serious loss to mankind." [1]

It will be noticed that the submission of this matter to the international tribunal is so worded as to preclude any

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1 No. 69. Let. Mr. Bayard to Mr. Vignaud.

idea of retraction or confession of wrong on the part of the United States. This step must, therefore, be regarded as taken solely from motives of comity.

Favorable replies to these invitations were received from Great Britain,[1] Russia,[2] France[3] and Japan.[4] Norway and Sweden approved the plan; but, while desiring the future privilege of joining in such an arrangement, they thought that their lack of interest in the seal fisheries made their present participation unnecessary.[5] No reply from Germany has as yet been made public.

To Mr. Bayard's proposal that a close time for fur seals be established between April 15 and November 1, and between 160° of longitude west, and 170° of longitude east in the Behring Sea,[6] Lord Salisbury assented.[7] Russia eagerly favored the international conference, and through her minister in London, Mr. de Staal, proposed to include in the treaty both her portion of the Behring Sea around the Commander Islands and the sea of Okhotsk.[8] The American Department[9] readily agreed to this proposition and Lord Salisbury suggested the extension of the regulated area to those parts of the Sea of Okhotsk and the Pacific Ocean north of north latitude 47°.[10]

Just at this juncture, however, these negotiations so

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1 No. 74. Let. Mr. Phelps to Mr. Bayard, Nov, 12, 1887.
2 No. 103. Let. M. de Giers to Mr. Lothrop, Nov. 25, 1887.
3 No. 70. Let. Mr. McLane to Mr. Bayard, Oct. 22, 1887.
4 No. 93. Let. Mr. Hubbard to Mr. Bayard, Sept. 29, 1887.
5 No. 106. Let. Mr. Magee to Mr. Bayard, March 20, 1888.
6 No. 76. Let. to Mr. Phelps, Feb. 7, 1888.
7 No. 78. Let. Mr. Phelps to Mr. Bayard, Feb. 25, 1888.
8 No. 81. Let. Mr. White to Mr. Bayard, April 7, 1888.
9 No. 83. Let. Mr. Bayard to Mr. White, April 18, 1888.
10 No. 84. Let. Mr. White to Mr. Bayard, April 20, 1888.

amicably pending at London were stopped. In June, 1888, the Canadian Government informed Lord Salisbury that a memorandum on this matter was being prepared for forwarding to London, and begged that Her Majesty's Government would delay all further action until its arrival.[1]

In consequence, all proceedings toward a solution through the channel of diplomacy came to a temporary standstill.

These friendly attempts of the two governments to adjust the difficulties in question proved to be but the lull before a storm. American seizures and British protests had ceased during 1888 only to be renewed during the summer of 1889. In obedience to a repetition of the orders of former years, the United States revenue cutter *Richard Rush* visited and searched in Behring Sea, on a charge of seal poaching, the British Columbian schooners *Black Diamond* and *Triumph*. The *Black Diamond* when hailed was about 35 miles from land and had on board 131 seal-skins which were transferred to the revenue steamer. A special officer of the United States was placed on board of the fishing vessel with orders to proceed to Sitka, there to deliver her up to the United States district attorney. The fact that the master took the law into his own hands, and, in violation of the instructions of the United States officers, brought his vessel to Victoria instead of Sitka, saved the United States the embarrassment of British interference in subsequent judicial condemnation proceedings.

The *Triumph* also was far out to sea, latitude 56° 05′ north, longitude 171° 23′ west, when seized. No

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1 No. 87. Let. Mr. White to Mr. Bayard, June 20, 1888.

seal-skins being found on board of her, she was warned and liberated. [1]

As before, these acts of alleged violence on the part of the United States were promptly protested against by Lord Salisbury.[2] The State Department again undertaking to justify these seizures, the suspended correspondence between the diplomatic representatives of the two countries was re-opened. No understanding between them was reached which would permit of a mutual regulation of the seal fishing for the season of 1890. It being rumored that orders similar to those of previous seasons had been issued to our revenue cruisers about to be dispatched to Behring Sea, Sir Julian Pauncefote formally protested against such threatened interference, and declared that his Government must hold the United States responsible for the consequences which might ensue therefrom.[3] But fortunately there resulted no clash of interests in the Behring Sea, during that season, of sufficient importance to call forth further remonstrance from Great Britain. Before the summer of 1891 arrived, diplomatic negotiations had proceeded so far that a *modus vivendi* was agreed upon by the two countries. This agreement, made June 15, 1891, has an additional interest in being a possible forecast of a permanent settlement to be hereafter made. It provides :

1. That Her Majesty's Government will prohibit, until May next, seal-killing in that portion of the Behr-

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1 See declaration and affidavit of the masters, and instructions of Capt. Shepard of the *Rush* to the special officer placed on board the *Black Diamond*, inclosures 4, 6 and 7, of No. 7, 1890.

2 No. 7, 1890. Let., The Marquis of Salisbury to Mr. Edwardes, Oct. 2, 1889.

3 No. 25, 1890. Inclosure of let. Pauncefote-Blaine, June 14, 1890.

ing Sea which belongs to the United States, "and will promptly use its best efforts to insure the observance of this prohibition by British subjects and vessels."

2. That the U. S. Government will prohibit seal-killing for the same period and in the same portion of the Behring Sea, "and on the shores and islands thereof, the property of the United States (in excess of 7,500 to be taken on the islands for the subsistence and care of the natives) and will promptly use its best efforts to insure the observance of this prohibition by United States citizens and vessels."

3. "Every vessel or person offending against this prohibition in the said waters of the Behring Sea, outside of the ordinary territorial limits of the United States, may be seized and detained by the Naval or other duly commissioned officers of either of the high contracting parties, but they shall be handed over, as soon as practicable, to the authorities of the nation to which they respectively belong, who shall alone have jurisdiction to try the offence and impose the penalties for the same." * * *

4. "In order to facilitate such proper inquiries as Her Majesty's Government may desire to make, with a view to the presentation of the case of that Government before arbitrators, and in expectation that an agreement for arbitration may be arrived at, it is agreed that suitable persons designated by Great Britain will be permitted at any time, upon application, to visit or to remain upon the seal islands during the present sealing season for that purpose." [1]

This agreement was signed with the express assur-

[1] New York Tribune, June 16, 1891.

ance on the part of the United States Government, solicited by Lord Salisbury, that it would consent to the appointment of a joint commission "to ascertain what permanent measures are necessary for the preservation of the seal species in the waters referred to;" such agreement "to be signed simultaneously with the convention of arbitration, and to be without prejudice to the questions to be submitted to the arbitrators."[1]

The powers, according to the *modus vivendi* to be exercised by Great Britain, had been previously provided for by an Act of Parliament, passed June 8, enabling Her Majesty, by Order in Council, to make specific provisions for prohibiting the catching of seals in Behring Sea by her subjects.[2]

Pursuant to article 4, Great Britain, on June 22, appointed Sir George Smyth Baden-Powell and Dr. Dawson,[3] who, during the summer of 1891, visited the seal islands of the Behring Sea and collected data for a report to their Government. The United States also appointed two commissioners, Professor T. C. Mendenhall and C. Hart Merriam, for a similar purpose. In January 1892, the Secretary of State arranged with the British Minister for a conference of the commissioners at Washington.[4] Early in February, the commission convened. Edward J. Phelps, ex-Minister to the Court of St. James, was appointed to act as chief counsel of the United States before this Board.[5] As yet the result of the conference is unknown.

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1 Let. Wharton-Sir J. Pauncefote, June 11, 1891, New York Tribune, June 16, 1891.

2 New York Tribune, June 9, 1891.

3 Id., June 23, 1891.

4 Id., Jan. 27, 1892.

5 Id., Feb. 4, 1892.

Meanwhile, the diplomatic battle, which for two years had been waged between Mr. Blaine and Lord Salisbury on the merits of the questions involved in the controversy, had culminated in the proposal of, and partial agreement to, definite terms of arbitration. Indeed, during the argument of the *Sayward* case before the Supreme Court at Washington, on the tenth of November, 1891, Attorney-General Miller announced that these terms had been finally decided upon.[1] President Harrison, in his opening message to Congress, December 9, 1891, said: "I am glad now to be able to announce that terms satisfactory to this Government have been agreed upon, and that an agreement as to the arbitrators is all that is necessary to the completion of the convention."[2] In the Queen's speech, opening Parliament, on Febuary 9, 1892, the following statement was made: "An agreement has been concluded with the United States, defining the mode by which the disputes regarding the seal fisheries in Behring Sea will be referred to arbitration."[3] The terms of the proposed agreement of arbitration, as far as the latest published correspondence reveals them, are:

"First. What exclusive jurisdiction in the sea now know as the Behring Sea, and what exclusive rights in the seal fisheries therein, did Russia assert and exercise prior and up to the time of the cession of Alaska to the United States?

"Second. How far were these claims of jurisdiction

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1 Stenographic report of oral arguments of counsel before the Supreme Court of the United States, in the case of the "W. P. Sayward," p. 72.

2 New York Sun, Dec. 10, 1891.

3 New York Tribune, Feb. 10, 1892.

as to the seal fisheries recognized and conceded by Great Britain?

"Third. Was the body of water now know as the Behring Sea included in the phrase "Pacific Ocean," as used in the treaty of 1825 between Great Britain and Russia, and what rights, if any, in the Behring Sea, were held and exclusively exercised by Russia after said treaty?

"Fourth. Did not all the rights of Russia as to jurisdiction and as to the seal fisheries in Behring Sea east of the water boundary, in the treaty between the United States and Russia of March 30, 1867, pass unimpaired to the United States under that treaty?

"Fifth. Has the United States any right, and, if so, what right of protection or property in the fur seals frequenting the islands of the United States in Behring Sea, when such seals are found outside the ordinary three-mile limit?

"Sixth. If the determination of the foregoing questions shall leave the subject in such position that the concurrence of Great Britain is necessary in prescribing regulations for the killing of the fur seal in any part of the waters of Behring Sea, than it shall be further determined: First, how far, if at all, outside the ordinary territorial limits it is necessary that the United States should exercise an exclusive jurisdiction in order to protect the seal for the time living upon the islands of the United States and feeding therefrom? Second, whether a closed season (during which the killing of seals in the waters of Behring Sea outside the ordinary territorial limits shall be prohibited) is necessary to save the seal fishing industry, so valuable and important to mankind, from deterioration or destruction? And, if so,

third, what months or parts of months should be included in such season, and over what waters it should extend?" [1]

To these Lord Salisbury would add:

"What damages are due to the persons who have been injured, in case it shall be determined by him [the arbitrator] that the action of the United States in seizing British vessels has been without warrant in international law?" [2]

"The President does not object to the additional question respecting alleged damages to English ships proposed by Lord Salisbury, if one condition can be added, namely: That after the issues of the arbitration are joined, if the United States shall prevail, all the seals taken by Canadian vessels during the period shall be paid for at the ordinary price for which skins are sold." [3]

The first, second and fourth questions above mentioned have from their first proposal been satisfactory to both countries. Questions third and fifth are given as modified by Mr. Blaine to meet the objections of Lord Salisbury. The sixth question, Lord Salisbury thinks, "would more fitly form the substance of a separate reference. Her Majesty's Government have no objection to refer the general question of a close time to arbitration, or to ascertain by that means how far the enactment of such a provision is necessary for the preservation of the seal species; but any such reference ought not to contain

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1 Let. Blaine-Pauncefote, April 14, 1891. Published, May 7, 1891.

2 Let. Salisbury-Pauncefote, Feb. 21, 1891; see United States, No. 1, (1891). Further correspondence respecting the Behring Sea seal fisheries. Presented to both Houses of Parliament by command of Her Majesty, March, 1891, London.

3 Let. Blaine-Pauncefote, April 14, 1891.

words appearing to attribute special and abnormal rights in the matter to the United States." [1]

No authoratative information can at present be obtained as to the personnel of the Board of Arbitration. But it will, it is stated, be composed of seven members. Two are to represent the United States, and two Great Britain. In reply to a question asked in the House of Commons, the Parliamentary Secretary of the Foreign Office, on February 10, said that Great Britain and the United States had agreed that France, Italy and Sweden should act as arbitrators. But these countries had not yet been asked to appoint their representatives on the Board.[2] Of the two British representatives, one will be from Canada. The sittings of the Board of Arbitration will be held in Paris.[2]

Within the past year a move has been made by the British Government which may result in practically withdrawing the settlement of the question of jurisdiction in Alaskan waters from the executive branch of the United States Government and giving it to the Supreme Court. During the early part of 1891, the Attorney General of Canada presented to the Supreme Court of the United States a suggestion for a writ of prohibition to be directed to the judge of the District Court of the United States in and for the Territory of Alaska, restraining him from all further proceedings in the case of the "W. P. Sayward," one of the British sealing vessels captured during the summer of 1887 by the U. S. Rev. Cutter, *Rush*. The owner, one Thomas Henry Cooper, a British subject,

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1 Let. Salisbury-Pauncefote, Feb. 21, 1891, *supra*.

2 New York Tribune, Feb. 11, 1892.

3 Id., Feb. 10, 1892.

presented a similar petition. The writ was requested on the ground of lack of jurisdiction in the Alaskan Court by reason of the fact that the seizure of the *Sayward* in the Behring Sea took place 59 miles from land and therefore without the jurisdiction of the United States. Sir John Thompson, the Canadian Attorney-General, in concluding his suggestion, "most respectfully informs this Honorable Court that the fact that this, his suggestion, is presented with the knowledge and approval of the Imperial Government of Great Britain, will be brought to the attention of the Court by counsel duly thereunto authorized by Her Britannic Majesty's representative in the United States."

Accordingly, a rule to show cause was granted to the Alaskan Court, and on Nov. 10th and 11th, 1891, the Supreme Court heard arguments for and against the issue of the writ. The British Government was represented by counsel, and the Attorney-General and Solicitor-General appeared on behalf of the United States. No decision on the application has as yet been rendered.

CHAPTER II.

The American Position.

"You will observe, from the facts given above, that the authorities of the United States appear to lay claim to the sole sovereignty of that part of Behring Sea lying east of the westerly boundary of Alaska, as defined in the first article of the treaty concluded between the United States and Russia in 1867, by which Alaska was ceded to the United States, and which includes a stretch of sea extending in its widest part some 600 or 700 miles easterly [westerly?] from the mainland of Alaska." [1]

That England should take this view of the course of the United States in protecting the seal fisheries of Alaska is not strange.

In the absence of the express provision of a treaty to the contrary, the right of a nation to visit and search ships of another nation is not recognized beyond its territorial limits. The exercise of the right beyond those limits implies a claim to sovereignty over the sea wherein the visit and search is made. But except in enclosed portions, no nation has jurisdiction over the sea beyond three miles or cannon-range from its coasts. Therefore, *prima facie*, the United States is either assuming sovereignty over a portion of the sea which lies outside its borders, or else is exerting upon the high seas an unwarrantable power. In either case, the burden of proof is on the United States,—in the first case to show ownership of the Behring Sea; in the second, to show exceptional circumstances justifying the seizures complained of.

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1 No. 3. Let. Earl of Iddesleigh to Sir L. S. S. West, Oct. 30, 1886.

Before inquiring how the United States supports this burden, we do well to glance at the various instances adduced by Mr. Blaine of British assumption of power in marine matters beyond the three-mile limit. If, indeed, the United States has the example of Great Britain as a precedent, its task of convincing her of the righteousness of its course is reduced to an appropriate citation of her history.

In the first place, England is reminded by Mr. Blaine that in 1816 during the captivity of Napoleon Bonaparte on the Island of St. Helena, she passed a Statute not only excluding ships of any nationality from landing on the island, but forbidding them "to hover within 8 leagues of the coast of the island." [1] Neither does Mr. Blaine state nor do we know of the seizure or exclusion under this Act of a single non-British vessel in the face of a protest from the sovereign under whose flag she sailed; so that, for aught we know, this Act, like the "Hovering Acts," may have been enforced, if enforced it was against foreign ships, in reliance, as Dana puts it, "on motives of comity" [2] in other nations. But further observe the international authorization on which Great Britain proceeded in enacting this measure. Russia, Prussia and Austria, by the treaty of Paris of August 2nd, 1815, specially intrusted the custody of Napoleon to the British Government. Was it unwarranted for Great Britain to suppose that this trust carried with it the power to take all steps necessary to its faithful execution? If it be objected that the United States and many other nations were not parties to that

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1 Let. Blaine-Pauncefote, Dec. 17, 1890,-1891.

2 Wheaton § 179, note.

treaty, the reply is ready that the peace of Europe, if not of the world, depended upon the safe-keeping of Napoleon Bonaparte. An international extremity calls for consideration and respect from the civilized world, without which no international law is possible. For the United States to have opposed a small commercial interest to the welfare of Europe, would have been an act of churlishness justly meriting a forfeiture of the good offices of the countries of that continent. In striking contrast to the magnitude of the object for which the St. Helena Statute was passed appear the financial considerations in furtherance of which there was enacted in 1799, and still stands on the statute book, a law enabling the revenue officers of the United States to board and search vessels at a distance of four leagues from its coast. [1]

Continuing, Mr. Blaine points out the excessive marine jurisdiction assumed by the Federal Council of Australasia, in the regulation of pearl and other fisheries. [2] We are informed that a provision of the very act which assumes such jurisdiction, limits its application to British subjects. This would, of course, deprive the citation of all analogical force. But, however that may be, here, as in the preceding illustration, an instance of the coercion of subjects or citizens of other nations is lacking.

The regulation of the Ceylon pearl fishery by British authorities, twenty miles to sea, has also been cast in the teeth of Great Britain. [3] But those authorities have

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1 Act of March 2, 1799, ch. 128, § 99; U. S. Rev. Stats. § 2760.

2 Same letter.

3 No. 9, 1890. Let. Blaine-Pauncefote, Jan. 22, 1890.

never excluded other nations from the profits of pearl fishing ; nor have other nations ever acknowledged any monopoly to England.[1] If they have never exercised their right to fish in these waters, it is to be presumed that they could not at a distance compete with native divers.

In a subsequent letter, Mr. Blaine calls attention to the act of Parliament of 1889 authorizing the Fishing Board to prohibit certain methods of fishing in the bay of the North Sea comprised between Duncansby Head in Caithness and Rattray Point in Aberdeenshire, Scotland. The area of water over which this regulation extends is 2700 square miles, with an opening to the sea 85 miles broad.[2] If we suggest in this connection the "Headland Doctrine," which concedes jurisdiction in such bays to the bordering nation, we do so not because we believe it affords a sufficient defence to the enforcement of this act against foreign vessels, but simply because it would lend to such an enforcement an argument, at least, which is wanting in support of our Behring Sea seizures. The great point to be noticed about the act is that there is absolutely nothing objectionable to be found in it, except the term used to denote against whom it shall be enforced,—"any person." This might, of course, include citizens or subjects of other countries ; but is it so intended and will such an interpretation be put into practice? The extreme improbability of any but British subjects fishing in a bay off the north-east coast of Scotland seems sufficient to raise a doubt that Parliament intended the expression to have

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1 James B. Angell. *Forum*, Nov. 1889.

2 Let. Blaine-Pauncefote, April 14, 1891.

a wider meaning. Be that as it may, we have not heard of any consequent interference with American or other non-British fishermen.

We may say, therefore, in general of all these British laws involving alleged excessive marine jurisdiction, that besides affording at best nothing but a *tu quoque* argument, they fail in the only characteristic which could constitute them useful analogies to the present issue, —*i. e.* the infliction of their penalties, in the face of a protest of another nation, upon one of its vessels. Until such an instance of their enforcement can be shown, they have no greater argumentative value in this controversy than the "Hovering Acts" (of which we hereafter speak), which are confessedly executed against foreign ships only by the consent of the nation whose flag flies on the coerced ship. In the enforcement of all such regulations, the acquiescence of other nations falls under the head of the maxim, *volenti injuria non fit.*

Coming now to the arguments proper on which the United States bases its Behring Sea policy, we find that from the first its solicitude has been for the preservation of the seal industry.[1] If proof be needed of the sincerity of that solicitude, it is found in the fact that in 1887 ten American vessels were seized and citizens of the United States were arrested for illicit killing of fur seals in the Behring Sea.[2] But not alone on the exigencies of seal life does Mr. Blaine found the claims of the United States, but also on territorial ownership and fishing privileges derived from Russia. So far from opposing the pretensions of Russia, while she owned Alaska, to

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[1] No. 124. Let. Sir L. S. S. West to Earl of Iddesleigh, Dec. 10, 1886.
[2] No. 76. Let. Mr. Bayard to Mr. Phelps, Feb. 7, 1888.

exclusive jurisdiction over the Behring Sea, the United States and Great Britain, contends Mr. Blaine, by omitting specific mention of that sea in the treaties of 1824 and 1825, distinctly conceded to Russia the rights therein to which she aspired. These exclusive rights were continuously exercised by Russia down to her cession of Alaska to the United States in 1867, when she transferred them unimpaired to the United States. In the United States they are now vested; and after her many years of silence, England is now estopped from denying their validity.

The contention that the outcome of the negotiations and treaties of 1820–1825 between Russia and Great Britain and the United States was the confirmation to Russia of certain exclusive privileges in the Behring Sea, is a contention which has a legal as well as an historical aspect. In the first place, it involves a claim, at least as against two other nations, to sovereignty over a large portion of the Behring Sea. This is but a restricted form of the ancient doctrine of *mare clausum*. It is true that such a claim is expressly repudiated by Mr. Blaine in his letter to Sir Julian Pauncefote of Dec. 17, 1890:[1]

"The repeated assertions that the Government of the United States demands that the Behring Sea be pronounced *mare clausum*, are without foundation. The Government has never claimed it and never desired it. It expressly disavows it. At the same time the United States does not lack abundant authority, according to the ablest exponents of International law, for holding a small section of the Behring Sea for the protection of

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[1] Message, Jan. 5, 1891.

the fur seals. Controlling a comparatively restricted area of water for that one specific purpose is by no means the equivalent of declaring the sea, or any part thereof, *mare clausum*."

But the acts, which it is the part of the United States Government to defend, are acts which can be rightfully committed in none but a closed sea. Sovereignty, Ortolan defines as "un sorte de droit de souveraineté, de tribut, de police ou de jurisdiction." [1] Less than as acts "de police ou de jurisdiction," we cannot well rate the seizure of vessels belonging to another nation. The United States cannot escape the imputation of laying claim to a portion of the Behring Sea as *mare clausum*, simply by naming the authority it has assumed in those waters, police power. That, as Ortolan shows, is an attribute of sovereignty. And for a nation to exercise it over any but a closed sea, "il faudrait donc que ce peuple se prétendit personellement le supérieur, le souverain des autres * *. L'empire des mers ne peut donc exister au profit de qui que ce soit, pas plus que le droit de propriété." [2]

Secondly, the argument of derivative rights from Russia implies prescription. It says not only that Russia acquired exclusive possession of Behring Sea, but that she acquired it by prescription. For it is not contended on the part of the United States Government that Great Britain ever expressly conceded to Russia the rights she claimed in the Behring Sea. "'Concession' as used here," says Mr. Blaine, "means simply *acquiescence* in the rightfulness of the title, and that is the

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1 Ortolan, I, p. 119.

2 Ortolan I, pp. 119 and 120.

only form of concession which Russia asked of Great Britain or which Great Britain gave to Russia."[1]

From this analysis, it will be seen that the case of the United States consists of three lines of argument—the historical, the legal and the expedient.

The three matters with which these arguments deal are:

1. The history of Russian rights in Behring Sea.

2. The extent to which the Doctrine of Free Sea is applied in modern International Law; and the existence of marine prescription.

3. The international police power conferred by the exigencies of pelagic sealing.

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1 Let. Blaine-Pauncefote, Dec. 17, 1890,–1891.

CHAPTER III.

Russian Rights in the Behring Sea.

In 1821 Russia first proclaimed to the world her sovereignty over the north Pacific Ocean. The extent of the dominion claimed is shown by the regulations published in pursuance to the ukase of the Emperor Alexander, made on the fourth of September, in that year:

"Sec. 1. The pursuits of commerce, whaling and fishing, and of all other industries, on all islands, ports and gulfs, including the whole of the northwest coast of America, beginning from Behring Strait to the fifty-first degree of northern latitude; also from the Aleutian Islands to the eastern coast of Siberia, as well as along the Kurile Islands from Behring Strait to the south cape of the island of Urup, viz, to 45° 50′ northern latitude, are exclusively granted to Russian subjects.

"Sec. 2. It is therefore prohibited to all foreign vessels not only to land on the coasts and island belonging to Russia, as stated above, but also to approach them within less than a hundred Italian miles. The transgressor's vessel is subject to confiscation, along with the whole cargo."

It will be noticed that this decree does not claim the whole of Behring Sea to be a closed sea; exclusive jurisdiction to only a marginal belt of one hundred miles is insisted upon. To be sure, Mr. Poletica, the Russian envoy to Washington, declared Russia's right to regard Behring Sea as a closed sea, and rested it on reasons of bi-lateral possessions. But that Russia did not stand upon that right, is evident from his words:

"I ought, in the last place, to request you to consider, sir, that the Russian possessions in the Pacific Ocean extend, on the northwest coast of America, from Behring's Strait to the fifty-first degree of north latitude, and on the opposite side of Asia and the islands adjacent, from the same strait to the forty-fifth degree. The extent of sea of which these possessions form the limits comprehends all the conditions which are ordinarily attached to *shut seas* (mers fermées), and the Russian Government might consequently judge itself authorized to exercise upon this sea the right of sovereignty, and especially that of entirely interdicting the entrance of foreigners. But it preferred only asserting its essential rights, without taking any advantage of localities." [1]

Nevertheless, JohnQuincy Adams, at that time Secretary of State, did not content himself with scouting the *mare clausum* idea advanced by the Russian diplomat, but instantly took up cudgels in defense of the privilege of the United States to enter even within the limit of one hundred miles. After opposing the coast claim set up in the ukase, he proceeds thus:

"This pretension is to be considered not only with reference to the question of territorial right, but also to that prohibition to the vessels of other nations, including those of the United States, to approach within 100 Italian miles of the coasts. From the period of the existence of the United States as an independent nation, their vessels have freely navigated those seas, and the right to navigate them is a part of that independence. * * To exclude the vessels of our citizens from the shore, be-

[1] No. 166. Let. Mr. Poletica to Mr. Adams, Feb. 28, 1822.

yond the ordinary distance to which the territorial jurisdiction extends, has excited still greater surprise." [1]

Against the *mare clausum* theory of Mr. Poletica, he urged an argument, of which a well-known writer at that time said: "A volume on the subject could not have placed the absurdity of the pretensions more glaringly before us:" [2]

"With regard to the suggestion that the Russian Government might have justified the exercise of sovereignty over the Pacific Ocean as a close sea, because it claims territory both on its American and Asiatic shores, it may suffice to say that the distance from shore to shore on this sea, in latitude 51° north, is not less than 90° of longitude, or 4,000 miles." [3]

Diplomatic agencies were thereupon set in motion to harmonize the antagonistic views of the two countries. The Secretary of State instructed the American Minister to Russia, Mr. Middleton, regarding the pending negotiations:

"From the tenor of the ukase, the pretensions of the Imperial Government extend to an exclusive territorial jurisdiction from the forty-fifth degree of north latitude, on the Asiatic coast, to the latitude of 51° north on the western coast of the American continent; and they assume the right of interdicting the navigation and the fishery of all other nations to the extent of 100 miles from the whole of that coast.

"The United States can admit no part of these claims. Their right of navigation and of fishing is perfect,

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1 No. 167. Let. Mr. Adams to Mr. Poletica, March 30, 1822.

2 North American Review, Vol. 15, p. 389.

3 Same letter.

and has been in constant exercise from the earliest times, after the peace of 1783, throughout the whole extent of the Southern Ocean, subject only to the ordinary exceptions and exclusions of the territorial jurisdictions, which, so far as Russian rights are concerned, are confined to certain islands north of the fifty-fifth degree of latitude and have no existence on the continent of America." [1]

The outcome was the treaty of the 17th of April, 1824. The articles bearing on the point in discussion are these:

"ART. I. It is agreed that in any part of the Great Ocean, commonly called the Pacific Ocean, or South Sea, the respective citizens or subjects of the high contracting powers shall be neither disturbed nor restrained, either in navigation or in fishing, or in the power of resorting to the coasts upon points which may not already have been occupied for the purpose of trading with the natives, saving always the restrictions and conditions determined by the following articles."

"ART. III. It is moreover agreed that, hereafter, there shall not be formed by the citizens of the United States, or under the authority of the said States, any establishment upon the northwest coast of America, nor in any of the islands adjacent, to the north of 54° 40′ of north latitude; and that, in the same manner, there shall be none formed by Russian subjects, or under the authority of Russia, south of the same parallel.

"ART. IV. It is, nevertheless, understood that during a term of ten years, counting from the signature of the

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[1] No. 171. Let. July 22, 1823.

present convention, the ships of both powers, or which belong to their citizens or subjects, respectively, may reciprocally frequent, without any hindrance whatever, the interior seas, gulfs, harbors, and creeks, upon the coast mentioned in the preceding article, for the purpose of fishing and trading with the natives of the country."

England, after similar expostulations against the obnoxious ukase and similar negotiations, obtained from Russia a treaty the provisions of which on the main points are identical with those of the American treaty. It was concluded February 28, 1825. Articles I of the two treaties correspond; IV of the American with VII of the British; article III of the British is given to explain a reference to it in article VII.

"I.—It is agreed that the respective subjects of the high contracting Parties shall not be troubled or molested, in any part of the ocean, commonly called the Pacific Ocean, either in navigating the same, in fishing therein, or in landing at such parts of the coast as shall not have been already occupied, in order to trade with the natives, under the restrictions and conditions specified in the following articles."

"III.—The line of demarkation between the possessions of the high contracting Parties, upon the coast of the continent, and the islands of America to the Northwest, shall be drawn in the manner following:

Commencing from the southernmost point of the island called *Prince of Wales* Island, which point lies in the parallel of fifty-four degrees forty minutes, north latitude, and between the one hundred and thirty-first and the one hundred and thirty-third degree of west longitude (Meridian of Greenwich), the said line shall ascend to the north along the channel called *Portland Channel*, as far

as the point of the continent where it strikes the fifty-sixth degree of north latitude; from this last-mentioned point, the line of demarkation shall follow the summit of the mountains situated parallel to the coast, as far as the point of intersection of the one hundred and forty-first degree of west longitude (of the same meridian); and, finally, from the said point of intersection, the said meridian line of the one hundred and forty-first degree, in its prolongation as far as the Frozen Ocean, shall form the limit between the Russian and British Possessions on the continent of America to the Northwest."

"VII.—It is also understood, that, for the space of ten years from the signature of the present convention, the vessels of the two Powers, or those belonging to their respective subjects, shall mutually be at liberty to frequent, without any hindrance whatever, all the inland seas, the gulfs, havens, and creeks on the coast mentioned in Art. III for the purposes of fishing and of trading with the natives."

The effect of these treaties upon the pretensions of Russia to the Behring Sea, as put forth in the ukase of Alexander, is a subject of dispute between Great Britain and the United States. Do the terms, "The Great Ocean, commonly called the Pacific Ocean, or South Sea" in Art. I of the United States treaty, and "the ocean, commonly called the Pacific Ocean" in the British, include the Behring Sea? Again, does "the north-west coast of America" in Art. III of the American treaty mean the entire northwest coast of the continent or only as far north as the Alaskan peninsula at the 60th parallel of north latitude?

The first question Mr. Blaine answers in the negative. So confident is he in the position to which he

thereby commits the United States and such importance does he attach to its maintenance, that he declares: "If Great Britain can maintain her position that the Behring Sea, at the time of the treaties with Russia of 1824 and 1825, was included in the Pacific Ocean, the Government of the United States has no well-grounded complaint against her." [1]

This position he supports by a list of maps published during the ninety years prior to 1825, which give a distinctive name to the body of water now known as Behring Sea. Lord Salisbury replies by citing thirty ordinary books of reference of various dates from 1795 downwards printed in various countries which show that in customary parlance the Pacific Ocean includes the Behring Sea." [2] The relevancy of the enjoyment by the Behring Sea of a peculiar and distinctive name, is not apparent. For it cannot be contended that the Behring Sea is thereby precluded from forming part of a larger whole, namely, the Pacific Ocean.[3]

Mr. Blaine then asks: "Is it possible that Mr. Canning and Mr. Adams, both educated in the Common Law, could believe that they were acquiring for the United States and Great Britain, the enormous rights inherent in the Sea of Kamschatka [one name by which Behring Sea was known] without the slightest reference to that sea or without any description of its metes and bounds, when neither of them would have paid for a village house lot, unless the deed for it should recite every fact and feature necessary for the identification of

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1 Let. Blaine-Pauncefote, Dec. 17, 1890,–1891.

2 Let. Salisbury-Pauncefote, Feb. 21, 1891. Correspondence submitted to Parliament, March, 1891, *supra*.

3 Id.

the lot, against any other piece of ground on the surface of the globe?" But cannot the question be equally well reversed? Is it possible that Mr. Canning and Mr. Adams, when neither of them would have paid for a village house lot, unless the deed for it should recite every fact and feature necessary for the identification of the lot, would have omitted the few words of reference which were necessary to include the Behring Sea, if there had been the slightest doubt that it was not included, in the phrase which they used? The intention of the negotiators to include the Behring Sea in such phrase is patent. What, otherwise, could have induced the Russian representative, Count Nesselrode, to employ in the treaties terms which, particularly in view of the nature and geographical extent of the controversy, could not but be open to at least the possible construction of including the Behring Sea? The expressions denoting the Pacific Ocean, used in the two treaties, are, with regard to Behring Sea, either general and inclusive or else vague and ambiguous. Only by giving them the general and inclusive interpretation, can all three negotiators be freed from the imputation of gross inexactitude.

But further, it is only fair to infer that the settlement contained in these treaties was commensurate with the dispute. And that the jurisdictional dispute extended to the Behring Sea, the words of the ukase of 1821 and the expressions on the part of the United States relating to it, leave no doubt. The prohibition contained in the two sections of that ukase applies to "*the whole of the north-west coast of America, beginning from Behring Strait* to the fifty-first degree of northern latitude." In opposing this usurpation of power, Mr. Adams em-

ployed language which unquestionably denied the claim to a band of 100 Italian miles on every portion of the coast referred to. Scarcely less convincing of the commensurate character of that denial with the claim against which it was aimed, is the entire correspondence on the subject, than Mr. Adams' explicit statement to Mr. Middleton :

"From the tenor of the ukase, the pretensions of the Imperial Government extend to an exclusive territorial jurisdiction from the forty-fifth degree of north latitude on the Asiatic coast, to the latitude of 51° north on the western coast of the American continent; and they assume the right of interdicting the navigation and the fishery of all other nations to the extent of 100 miles from the whole of that coast.

"The United States can admit no part of these claims." [1]

In order to gather from Mr. Adams' words any different meaning, we should have to persuade ourselves, as Lord Salisbury declines to do, "that when Mr. Adams used these clear and forcible expressions he did not mean what he seemed to say; that when he stated that the United States 'could admit no part of these claims,' he meant that they admitted all that part of them which related to the coast north of the Aleutian Islands." [2]

Whatever interpretation we find foregoing events put upon the words of the American Treaty, we must read into the same words in the English. We must, therefore, conclude, in the words of Lord Lansdowne, that

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[1] No. 171. Let. July 22, 1823.

[2] Let. Salisbury-Pauncefote, Aug. 2, 1890,–1891.

"It is impossible to believe that when, by the convention in 1825, it was agreed that the subjects of Great Britain, as one of the contracting parties, should not be 'troubled or molested in any part of the ocean, commonly called the Pacific Ocean, either in navigating the same, or in fishing therein,' any reservation was intended with regard to that part of the Pacific Ocean known as Behring Sea. The whole course of the negotiations by which this convention and that between Russia and the United States, of the same year, were preceded—negotiations which, as pointed out in the report, arose out of conflicting claims to these very waters—points to the contrary conclusion." [1]

To the second of the two questions growing out of these treaties and oppositely answered by the two governments, Mr. Blaine replies that "the northwest coast of America," mentioned in Art. III of the American treaty, to which the provisions of Art. IV apply, extends not to the Behring Strait, but only to latitude 60°, the beginning of the Alaskan Peninsula. He argues that "the phrase 'northwest coast of America' has not infrequently been used simply as the synonym of the 'northwest coast,' but it has also been used in another sense as including the American coast of the Russian possessions as far northward as the straits of Behring. Confusion has sometimes arisen in the use of the phrase 'northwest coast of America,' but the true meaning can always be determined by reference to the context." [2]

It seems unlikely that an expression so capable of two meanings that the correct one can be learned only

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1 No. 117. Let. to Mr. Stanhope, Nov. 29, 1886.

2 Let. Blaine-Pauncefote, Dec. 17, 1890,-1891.

by an examination of the context, should have been selected as the pivot of an important treaty by Count Nesselrode and John Quincy Adams. If however, the expression be thus susceptible of two such widely different interpretations and it be used in such a connection that the immemediate context sheds no light upon its meaning, surely it is to be given the more obvious of the two meanings. "It is difficult to conceive," said Lord Salisbury "how the term 'northwest coast of America,' used here and elsewhere, can be interpreted otherwise than as applying to the northwest coast of America generally, or how it can be seriously contended that it was meant to denote only the more westerly portion, excluding the more northwesterly part, because by becoming Russian possession this latter had ceased to belong to the American continent." [1]

But the only result of success in confining the phrase, "the northwest coast of America" as used in Art. III, to that portion of the coast south of the 60° of latitude, would be to limit the territorial extent of the privilege accorded in Art. IV of frequenting the interior seas, gulfs, harbors and creeks. It would not affect the interpretation of Art. I.

If, on the other hand, the phrase means what it seems to mean, then the concession of the privilege of frequenting such interior seas, etc., on the coast of the Behring Sea, as well as on the remainder of the northwest coast, shows conclusively that the privilege of frequenting every other part of the coasts except interior seas, gulfs, harbors and creeks, already existed,—in other words, that it was conferred by Art. I. "The

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1 Let. Salisbury-Pauncefote, Aug. 2. 1890,-1891.

Great Ocean, commonly called the Pacific Ocean, or South Sea," in the first article, must therefore, as we have already shown, include the Behring Sea ; and the right of United States citizens to free navigation and fishing in those waters, being based on Art. I, survived the termination of Art. IV.

President Angell states that after the expiration of the rights conferred by Art. IV, American whalers continuously navigated the Behring Sea ; and he argues from this fact that Russia did not regard the Behring Sea as such an "interior sea" as could be frequented only by virtue of Art. IV. If it is not such an interior sea, then, concludes he, it must have been included in the phrase, "Pacific Ocean or South Sea," used in the first article. In this view, H. H. Bancroft, in his "History of Alaska," bears him out by recounting the incident of the Russian Minister of Foreign Affairs, who, in 1842, explicitly refused to send cruisers to interfere with American whalemen in Behring Sea, on the ground that such interference would be in violation of the rights conferred by Art. I of the treaty with the United States.

At the expiration of the term of continuance of Article IV, a question arose as to what right of frequenting unoccupied coasts remained under Article I of the same treaty. Mr. Forsyth, at that time Secretary of State, declared the meaning of the fourth article to be the extension of Article I, so as to include within its provisions interior bays, &c., occupied or about the occupation of which there might be doubt. Accordingly, the expiration of that article did not affect the right granted by Article I to frequent the unoccupied coasts.

Russia on the contrary declared the American right to frequent the interior bays, &c., of Alaska, occupied or

unoccupied, to rest solely on Article IV and hence to be of only equal duration. [1]

A settlement of this difference was never reached. Russia refused to comply with the request of the United States to renew Article IV. What the rights in these waters then were, such they remained down to the cession of Alaska in 1867. In that treaty, ratified by the United States on May 28, 1867, Russia ceded to the United States a tract whereof:

"The western limit within which the territories and dominion conveyed, are contained, passes through a point in Behring's Straits on the parallel of sixty-five degrees thirty minutes north latitude, at its intersection by the meridian which passes midway between the islands of Krusenstern, or Ignalook, and the island of Ratmanoff, or Noonarbook, and proceeds due north, without limitation, into the same Frozen Ocean. The same western limit, beginning at the same initial point, proceeds thence in course nearly southwest, through Behring's Straits and Behring's Sea, so as to pass midway between the northwest point of the Island of St. Lawrence and the southeast point of Cape Choukotski, to the meridian of one hundred and seventy-two west longitude; thence, from the intersection of that meridan, in a southwesterly direction, so as to pass midway between the island of Attou and the Copper Island of the Kormandorski couplet or group in the North Pacific ocean, to the meridian of one hundred and ninety-three degrees west longitude, so as to include in the territory conveyed the whole of the Aleutian Islands east of that meridian." [2]

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1 No. 190. Count Nesselrode to Mr. Dallas, April 27, '38.
2 No. 191.

In a sea so full of islands as the Behring, a line similar to the one drawn in this treaty is a terse method of indicating the islands conveyed. It avoids the tedium of an enumeration. Therefore the apparent grant of sea which the drawing of such a line effected ought not to deceive. All rights and privileges which Russia herself possessed in that sea passed by another portion of this treaty absolutely to the United States.

CHAPTER IV.

But beyond and behind the question of the claims of Russia and their transfer to the United States, is the deeper question, have those claims ripened into rights? and, if not, even though their history be such as Mr. Blaine contends, can England be estopped from denying them now? Disguise the claim to *mare clausum* as you will, openly and expressly repudiate it, as the United States has done, the assertion of jurisdiction over a band of one hundred Italian miles around the shores of the Behring Sea, or over any distance beyond three miles, is nothing less than a revival of the old-time doctrine of *mare clausum*. Base that jurisdiction on its long continued recognition by another nation as you will, call its present denial *contra bonos mores* and a discrimination against the United States, as Mr. Blaine has done, and you only re-echo the cry of the Middle Ages, prescription of the sea. Of greater moment than the winning of an argumentative point, is the duty the United States owes to its national honor to justify its acts and validate its claims in Alaskan waters with full knowledge of, and in strict conformity to the established principles of International Law. Let us see how far they support these claims and acts.

Mare Liberum vs. Mare Clausum.

"There is no writer, there is no government, which would dream at this day of renewing these pretensions of another epoch."[1]

With this language, Ortolan, the great writer on

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1 Ortolan, Règles I, p. 137.

maritime diplomacy, disposes of the claims to national sovereignty over the high seas.

The motive of inventing a patriotic argument will not constrain us to incur the stigma of that statement. We need therefore not begin the inquiry into the status of the seas, before the time when "Le principe de la liberté des mers, tant combattu par l'Angleterre, est sorti du champ des discussions théoriques pour entrer triomphalement dans le domaine pratique de toutes les nations." [1]

We may fix this time roughly at the appearance of Grotius' "Mare Liberum," in 1609. Venice had for centuries maintained her supremacy over the Adriatic. Spain and Portugal had, on the foundation of naval prowess and Papal grant, set up an extensive claim in the Pacific and Indian oceans. England ruled mistress of her surrounding seas. And Holland stretched her rod of dominion over the North Sea. These pretensions had their juristic champions in Father Paul Sarpi, who, in 1676, wrote a vindication of the rule of Venice over the Adriatic; and Selden (Mare Clausum, 1635) and Albericus Gentilis (Advocatio Hispanica, 1613), who succeeded in strengthening for a few years the crumbling claims of England.[2] But this mist of selfish national pretensions hanging over the high seas soon dispersed before the piercing light of international principle. Grotius, Vattel,[3] Puffendorf,[4] and Bynkershoek,[5] have established so firmly the law of the freedom of the ocean, that it can be said with strict truth:

1 Calvo, Le Droit International, I, § 211.

2 Wheaton's Elements, pp. 267 and 268.

3 Droit des Gens, 1758.

4 De Jure Naturæ et Gentium, 1672.

5 De Dominio Maris, 1702.

"Aujourdhui les discussions sur le domaine et sur l'empire des mers, dont nous venons de tracer le tableau, sont reléguées dans le pur domaine de l'histoire." [1]

But the grasp by single nations of certain portions of the sea was so firm that only by removing one finger at a time has the union of nations finally forced it to relax.

1. England particularly thought that her sway over the four surrounding seas furnished an instance of might making right. This claim, backed by the authority of Albericus Gentilis,[2] she asserted over the British Channel, from the island of Quessant, even after she had given up the Duchy of Normandy and Calais, "a circumstance," says Phillimore, "of considerable weight with respect to her claim." [3] Elizabeth seized some Hanseatic vessels even off Lisbon, for passing without permission through the sea north of Scotland.[4]

This pretension on the part of England consisted chiefly of the right of exclusive fishing and of exacting from common vessels the homage of salute.[5] But it has never been sanctioned by general acquiescence.[6]

Holland held out strenuously against it, and Cromwell was forced to make war upon her to compel its acknowledgment.[7] Yet it is true that by payments and by taking out licenses to fish, the Dutch occasionally admitted these claims, and by the Treaty of Westminster, 1674, they conceded in the amplest manner

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1 Ortolan, I, p. 137.
2 Advocatio Hispanica.
3 Phillimore's Commentaries I, § 181.
4 Id.
5 Phil. I, § 183.
6 Wheaton, p. 262.
7 Id., § 182.

to the English flag, the homage sought. Sir W. Temple, who negotiated this treaty, speaks, however, of the right hereby conceded to Great Britain as one "which had never yet been yielded to by the weakest of them that I remember in the whole course of our pretence; and had served hitherto but for an occasion of quarrel, whenever we or they had a mind to it, upon either reasons or conjectures." [1]

France never formally acknowledged the British claims. In 1689, Louis XV published an ordinance forbidding his naval officers to give the demanded salute. This insult to the British flag was alleged by William III, in his manifesto of 27th May, 1689, as one of the causes of war with France.[2]

Yet since that proclamation, Great Britain has never again insisted upon any such pretension. And even in the days of Charles II and James II, Sir Leoline Jenkins, expounder of all international law to those monarchs, had refused to assert Great Britain's dominion into the sea beyond a line drawn from headland to headland, comprising what are called the King's Chambers.

2. Denmark has from the earliest days jealously guarded the three entrances to the Baltic, the Greater and Lesser Belt and the Sound; and exacted toll from passing commerce.[3] The Danish jurists rested this right upon immemorial prescription and treaties. The earliest of these treaties is that with the Hanseatic Republics in 1368; and the right was subsequently

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1 Phil. I, § 184.
2 Id., § 186.
3 Wheaton, p. 264.

confirmed by treaties with all the maritime powers. Although by the treaty of Roeskild, 1658, the Province of Scania was ceded to Sweden, yet Denmark preserved her dominion over these straits intact by the payment to Sweden of a compensation.[1]

Underlying Denmark's jurisdiction over the passages which form the key to the Baltic, was her just right to remuneration for maintaining along these coasts lighthouses and buoys.[2] To this element of the claim is undoubtedly due the fact that not until 1857 were these Danish straits recognized as free. The great European powers then paid to Denmark a gross sum for the perpetual maintenance of proper coast and channel demarcation.[3] And on April 11, 1857, the same privilege was secured to the United States by the payment of $393,011.[4]

But at the beginning of the Seventeenth Century, Denmark had put forward much broader claims than those just mentioned. In 1602, Queen Elizabeth sent to Copenhagen an embassy to adjust generally the relations between the two countries. The instructions given it were these:

"And you shall further declare that the Lawe of Nations alloweth of fishing in the sea everywhere, * * * so if our men be barred thereof, it should be by some contract."

"Sometime, in speech, Denmark claymeth propertie in that sea, as lying between *Norway* and *Island*,—both sides in the dominion of oure loving brother the King;

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1 Wheaton, p. 265; Phil. I, § 179.

2 Twiss' Rights and Duties of Nations in Time of Peace, § 179.

3 Phil. I, § 179.

4 Wheaton, p. 266, note.

supposing thereby that for the propertie of a whole sea, it is sufficient to have the banks on both sides, as in rivers. Whereunto you may answere, that though property of sea, in some small distance from the coast, maie yeild some oversight and jurisdiction, yet use not princes to forbid passage or fishing, as is well seen in our seas of England, and Ireland, and in the Adriaticke Sea of the *Venetians*, where we in ours and they in theirs, have propertie of command; and yet we neither in ours, nor they in theirs, offer to forbid fishing, much lesse passage to ships of merchandize; the which by Lawe of Nations cannot be forbidden ordinarilie; neither is it to be allowed that propertie of sea in whatsoever distance is consequent to the banks, as it happeneth in small rivers. For then, by like reason, the half of every sea should be appropriated to the next bank, as it happeneth in small rivers, when the banks are proper to divers men; whereby it would follow that no sea were common, the banks on every side being in the propertie of one or other; wherefore there remaineth no color that Denmarke may claim any propertie in those seas, to forbid passage or fishing therein."[1] * *

The constant opposition of both Holland and England to these pretensions of Denmark, sufficed to reduce them so late as the eighteenth century only to the contracted form of exclusive fishing within fifteen miles of Iceland.[2] The capture in 1740 by a Danish man-of-war of Dutch vessels fishing within the prescribed limits, and their subsequent condemnation at

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1 Phil. I, § 189 citing Rymer Foed., t. xvi, pp. 433-4.

2 Phil. I, § 190 and 191.

Copenhagen, led to a vehement protest on the part of the States General.[1] In the Remonstrance to the Danish Government, passed April 17, 1741, they declared that the sea being free, it was proper for every one to fish in it, "pourvu qu'il ne fasse pas d'une manière indue." Fishing within four German miles of the coast was not such a "manière indue;" for although Denmark might make such a *municipal* prohibition binding on her own subjects, she could not convert it into an *international* obligation.[2]

3. The peculiar status to-day of the Dardanelles, Bosphorus and Marmora Sea, rests on treaty regulation. In the days when the shores of the Black Sea were entirely within her domain, the Porte was entitled to the exclusive exercise of jurisdiction over these marine avenues. But when Russia obtained a foothold on the Black Sea, she acquired by international law an easement of communication with the Mediterranean. Owing, however, to the non-recognition of Christian law by the Turks, this right was not granted to Russia until the treaty of 1774. Subsequent treaties with Austria in 1784, with Great Britain in 1799, with France in 1802, and with Prussia in 1806, secured to these powers the same free navigation for merchant vessels.[3] So in 1829 by the Treaty of Adrianople the same privilege was conceded to all European nations in amity with the Porte.[4] On February 25, 1862, the rights of the most

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1 *Id.* I, § 192.

2 Martens, Causes Célèbres, Vol. I, pp. 281-2.

3 Twiss, § 180; Wheaton, p. 263.

4 Sept. 2, Wheaton, p. 263; Martens, Nouveau Recueil, vol. viii, p. 143, at p. 147.

favored nations with regard to passage through these straits were accorded to the United States.[1]

But Turkey still claims the power to exclude from these seas foreign war ships. Immemorially asserted, this claim has been formally sanctioned by the European powers in the treaties at London, July 13, 1841,[2] and at Paris, March 30, 1856.[3]

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1 Wheaton, p. 264, note. Wheaton's History of Law of Nations, 583-5.
2 Martens, N. R. Gén. t. II, p. 129; Wheaton, p. 263.
3 Martens, N. R. Gén. t. XV, p. 785; Wheaton, p. 264, note.

CHAPTER V.

Prescription.

Although prescription is but a method of acquisition of property and cannot be invoked to acquire what is in itself incapable of acquisition, yet it is sometimes thought to have this magic effect.

In addition to the preceding history which shows property in or control over the high seas, by whatever means acquired, to be incompatible with the rights of other nations, there is the direct authority of International Law to the effect that prescription or immemorial use does not appertain to the sea. Indeed it is extremely doubtful whether prescription has a place in any branch of the law of nations whatever. Unlike adverse possession or limitation, prescription rests for its validity on a presumed prior grant. Now in International Law there is no room for such a presumption. History is not so susceptible of oblivion or national archives of destruction as to call it into existence.

On the other hand, exact and artificial ideas like adverse possession and limitation are utterly inconsistent with such undeveloped legislative and administrative organs as are the international.[1]

But however it may be with international prescription in general, it is certain that international jurisprudence does not recognize prescription against the sea. Vattel clearly states this:

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1 Rayneval, l. II, ch. VIII, §§ 1 and 2; Hautefeuille, vol. I, p. 47; Martens, Précis, l. II, ch. IV, §§ 70 and 71. But see contra Phillimore, §§ 256-259; Vattel, l. II, ch. X, §§ 140-151.

"As the rights of navigation and of fishing, and other rights which may be exercised on the sea, belong to the class of those rights of mere ability (*jura meræ facultatis*), which are unprescriptable, they cannot be lost for want of use. Consequently, although a nation should happen to have been, from time immemorial, in sole possession of the navigation or fishery in certain seas, it cannot, on this foundation, claim an exclusive right to those advantages. For, though others have not made use of their common right to navigation and fishery in those seas, it does not thence follow that they have had any intention to renounce it, and they are entitled to exert it whenever they think proper."[1]

Phillimore uses nearly the same language:

"The right of navigation, fishing and the like, upon the open sea, being *jura meræ facultatis*, rights which do not require a continuous exercise to maintain their validity, but which may or may not be exercised according to the free will and pleasure of those entitled to them, can neither be lost by non-user or prescribed against, nor acquired to the exclusion of others by having been immemorially exercised by one nation only. No presumption can arise that those who have not hitherto exercised such rights, have abandoned the intention of ever doing so."[2]

Calvo recognizes the temptation which the proximity to the coast of "fish, oysters and other shell-fish" affords to nations, to extend their sovereignty beyond the three-mile limit. Yet, instead of permitting such an extension, even when supported by long use, he

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1 Vattel, l. I, ch. XXIII, § 285.

2 Phil. I, § 174.

distinctly says: "De pareilles dérogations aux principes universellement reconnus * ont besoin, * pour devenir obligatoires, d'être sanctionnées par des conventions expresses et écrites." [1]

It is true that Vattel in another section observes: "Qu'une nation en possession dela navigation et de la pêche en certain parages, y prétende un droit exclusif et défende à d'autres d'y prendre part; si celles-ci obéissent à cette défense, avec de marques suffisantes d'acquiescement, elles renoncent tacitement à leur droit en faveur de cellelà, et lui en établissent un qu'elle peut légitimement soutenir contre elles dans la suite, surtout lorsqu'il est confirmé par un long usage." [2]

And that Phillimore quotes this language with the remark: "The reasoning of Vattel does not seem to be unsound." [3] But the passage quoted in no wise supports prescription in the sea. The right to which Vattel here refers, and which he says one nation may acquire to the exclusion of others, springs not from "long usage," but from the obedience of other nations to the prohibition of one, accompanied by what he calls "marques suffisantes d'acquiescement." He merely adds as something over and above what is necessary to the establishment of this right, "*surtout lorsqu'il* est confirmé par un long usage."

Wheaton refers to this passage from Vattel when, in laying down the proposition that the sea can never be appropriated, he says:

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[1] § 201.

[2] Vattel l. I, ch. XXIII, § 286.

[3] Phil. I, § 176.

"The authority of Vattel would be full and explicit to the same purpose were it not weakened by the concession that though the exclusive right of navigation or fishery in the sea cannot be claimed by one nation on the ground of immemorial use, nor lost to others by non-user on the principle of prescription, yet it may be thus established where the non-user assumes the nature of a consent or tacit agreement, and thus becomes a title in favor of one nation against another."[1]

Thus the above language of Vattel cannot be cited as authority for any broader rule than that an exclusive right in the sea may be acquired by one nation by virtue of the constructive consent or tacit agreement on the part of others. Such a rule would be far from establishing prescription; for a simple lapse of time is, as we have seen above, not "a sufficient mark of acquiescence" on the part of other nations, even if the other nations failed to object to the exercise of such exclusive right, or voluntarily executed the ordinances of the excluding nation.[2]

Although we do not deny the principle of Vattel here enunciated, it is difficult to see what, except express treaty stipulations, could constitute "marques suffisantes d'acquiescement." Phillimore confesses of this principle: "The case for its application is not often likely to occur."[3] Lord Stowell says: "The general presumption certainly bears strongly against such exclusive rights, and the title is a matter to be established on the

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1 Wheaton, p. 268.

2 Hautefeuille, vol., I. p. 44.

3 Phil. I, § 176.

part of those claiming under it * * by clear and competent proof." [1]

Could such a tacit consent be found, the exclusive right founded upon it would appear to have as good a *raison d'être* as if granted by express treaty. History contains many notable instances of a nation waiving its privileges in favor of another by treaty, thereby constituting an exclusive right in the grantee nation over against the grantor nation. As Phillimore says: [2]

"A nation may acquire an exclusive right of *navigation* and *fishing* of the main ocean *as against another nation* by virtue of specific provisions of a treaty; for it is competent to a nation to renounce a portion of its rights." [3]

A prominent illustration to-day is the agreement with China, by virtue of which Great Britain has jurisdiction over British subjects, "being within the dominions of the Emperor of China, or being within any ship or vessel at a distance of not more than one hundred miles from the coast of China."

But such treaties do not confer upon the grantee nation the property in the sea over which it is entitled to exercise exclusive jurisdiction. As Hautefeuille says, the consent even of all nations could not confer sovereignty over the seas.[4] (And, as he here adds,

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1 The Twee Gebroeders, 3 C. Rob. p. 339. The dictum credited to Lord Stowell in his opinion in this case, "Portions of the sea are prescribed for," is shown by the context not to apply to the high sea. Twiss, § 175, cites this opinion without comment. His reference at this place to Story in "The Schooner Fame," 3 Mason p. 150 is an error; it is intended for the preceding sentence.

2 Phil. I, § 173.

3 Phil. I, § 172.

4 Hautefeuille, vol. I, p. 47.

what the express consent of nations cannot accomplish, prescription cannot.) The right so granted is one which rests solely upon the *bona fides* of the nation according it, and is made permanent only by estoppel.[1]

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[1] Phil. I, § 174 citing Ulpian Dig., l. VIII t. IV, leg. 13.

CHAPTER VI.

Exceptions to the Rule of Mare Liberum.

Yet the welfare and safety of nations has always demanded that certain portions of the sea should be subject to their dominion. This principle has existed side by side with that of the freedom of the seas. By the interaction and attrition of these two forces in the chaos of national claims, there has been evolved the law on maritime sovereignty of to-day.

In general, whenever the reasons for the law of free sea cease, the law ceases. These reasons are given by the best writers as two-fold,[1] and are tersely expressed by Ortolan, as follows:

"Il n'y a que deux raisons décisives sans réplique, l'une physique, matérielle, l'autre morale, purement rationelle. L'impossibilité de la propriété des mers résulte de la nature de cet élément, qui ne peut être possédé et qui sert essentiellement aux communications des hommes * *. L'impossibilité de l'empire des mers résulte de l'égalité des droits et de l'indépendance réciproque des nations."[2]

The portions of the sea which are thus regarded as falling outside the pale of these objections are:

A. Gulfs and bays.

B. Enclosed seas (*maria clausa*).

C. Straits.

D. Marginal belt.

These terms include, of course, all bodies of water

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1 Wheaton, p. 269.

2 Ortolan I, p. 112. Sommaire de ch. 7.

bounded by similar formations of coast line, although called by other names.

Within certain limits, which we shall now study, such bodies of water are subject to national jurisdiction.

I. When the Shores belong to one Nation.

A.—*Gulfs and Bays.*

Wheaton tests gulfs and bays by the standard above mentioned and finds that the two objections to sovereignty over the high seas do not apply to them. For, says he, "the State possessing the adjacent territory by which these waters are partially surrounded and enclosed, has that physical power of constantly acting upon them, and, at the same time, of excluding at its pleasure, the action of any other State or person which * * constitutes possession. These waters cannot be considered as having been intended by the Creator for the common use of all mankind, any more than the adjacent land * * ."[1]

This reasoning obviously is true only so long as the entrance to the bay or gulf from the sea is narrow enough to be defended against intruders. But Pomeroy points out that the pretension of England on her own coasts is that such bodies of water are *mare clausum* irrespective of the breadth of their communication with the sea.[2]

There is no warrant for such a narrow limit as set by Martens:[3] "Surtout en tant que ceux-ci ne passent

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1 Wheaton, p. 270.

2 Lectures on International Law, § 147; but see *infra*, under "Headlands."

3 Précis, l. ii, c. i, § 40.

pas la largeur ordinaire des rivières, ou la double portée du cannon." Nor for the vague definition of Grotius:[1] "Mare occupare potuisse ab eo qui terras ad latus utrumque possideat, etiamsi aut supra patet ut sinus, aut supra et infra ut fretum, dummodo non ita magna sit pars maris ut non cum terris comparata portio earum videri possit."[2]

"The real question * * is, whether it be within the physical competence of the nation, possessing the circumjacent lands, to exclude other nations from the whole portion of the sea so surrounded."[3] The principle here then may be stated in Vattel's terse expression: "Une baie dont on peut défendre l'entrée, peut être occupée et soumise aux lois du souverain."[4]

On authority it is immaterial whether this defense be natural or artificial,[5]—whether the mouth be blocked by "islands, banks of sand or rocks"[6] or swept "by the cross-fire of cannons."[7] So that now it is "*res adjudicata* that the only question is whether a given sea or sound is, in fact, as a matter of politico-physical geography, within the exclusive jurisdiction of one nation."[8]

But this limit of the mouth of an inner gulf or bay, above set forth, is in the case of a particular country liable to be extended or contracted, according to the

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1 De Jure etc., Lib. ii, cap. iii, § 8.

2 Phil. I, § 200.

3 Phil. I, § 200.

4 Droit, l. i, ch. xxiii, § 291. See also Phil. I, § 200; Klüber, § 130; Twiss, § 174.

5 Ortolan, p. 145. Phil. I, § 200, citing Martens, *Primae Lineae Juris Gentium*, l. IV c. IV, § 110.

6 Calvo I, § 190.

7 *Id.*

8 Dana's Wheaton, 270, note.

recognition or non-recognition of the doctrine of "headlands." This doctrine will be discussed under the head of "Marginal Belt."

B.—*Enclosed Seas.*

These are the seas which the territory of one or more nations *entirely* surrounds. Ortolan is very particular about the absolutely close character of this territorial surrounding. "Un droit exclusif de domaine et de souveraineté de la part d'une nation sur une telle mer n'est incontestable qu'autant que cette mer est *totalement enclavée* dans le territoire de telle sorte qu'elle en fait partie intégrante, et qu'elle ne peut absolument servir de lien de communication et de commerce qu'entre les seuls citoyens de cette nation." [1] Though perhaps Twiss more exactly defines an interior sea, when he says that it "is entirely enclosed by the territory of a nation, and has no other communication with the ocean than by a channel, of which that nation may take possession." [2]

The Black and Caspian Seas are the usual illustrations of this kind of sea.[3] The former, however, by the treaty of Paris, in 1856, confirming previous treaties, has been made free.[4]

Seas land-locked, though not entirely surrounded by land, like the Baltic Sea, fall under the same rule.[5] But in the case of the Baltic Sea, the dominion must

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1 Ortolan, I, p. 147.
2 Twiss, § 174.
3 Phil. I, § 205.
4 Pomeroy, § 143.
5 Pomeroy, § 143; Phil., I, § 206.

be termed qualified rather than absolute, owing to the fact that the sovereignty of its shores is divided among several nations. This, as we shall hereafter see, subjects a sea to the innocent use of other nations.[1]

C.—*Straits.*

The only question which can arise here, is in the case of straits which connect two free seas. Straits leading into an inner bay, or enclosed sea, are subject to the same rules which are applied to those bodies of water themselves.[2]

There are two extreme theories about straits both banks of which belong to one and the same nation, and which join two open seas. One is, that be they never so narrow and therefore capable of possession, yet they are not subject to national domination. The other, that without regard to their width or defensibility, they fall under the jurisdiction of the bordering country. The first view is held by Calvo.[3] Ortolan,[4] Rayneval, Pomeroy,[5] and Wheaton[6]; the second by Phillimore[7] and Puffendorf.[8] There is also a third view, represented by J. L. Klüber,[9] Pinheiro-Ferreira, Twiss[10] and Martens,[11] which makes even here capability of defense the test of sovereignty. According to this last view, those straits would be free

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1 Ortolan, I, p. 147; Pomeroy, § 143.
2 Calvo, I, § 191.
3 I, § 191.
4 I, p. 146.
5 § 139.
6 p. 272, § 190.
7 I, § 189.
8 L. IV, C. V, § 8.
9 § 130.
10 § 174.
11 Law of Nations, B. IV, Ch. IV, § 13.

in which a ship passing along the centre is beyond the range of cannon.

The reason for the first rule is best expressed by Rayneval: "Si l'usage de ces mers est libre, la communication doit l'être également; car autrement la liberté de ces mêmes mers ne serait qu'une chimère." [1]

"It is not sufficient, therefore," says Ortolan, "in order that property in a strait may be attributed to a nation, mistress of its shores, to say that in fact the strait is in the power of this nation; that it has the means to control the passage by its artillery, or by any other mode of action or defense. * * The material obstacle to proprietorship being removed, there always remains the moral obstacle, the essential and inviolable power of peoples to communicate with each other." [2]

But this view concedes to the bordering State the right to charge such tolls as shall compensate it for light-houses, buoys and pilots.[3] And subjects ships passing under the cannon of that country to such reasonable regulations of navigation as it may make.[4]

The second and third rules are based on the safety of the bordering nation.[5] They, in turn, mitigate their rigor by adopting the doctrine of what Vattel calls "innocent use." [6] "One must remark in particular," he says, "with respect to straits, that when they serve for a communication between two seas, the navigation of which is common

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1 Inst. du droit de la nature et des gens. L. 2, Ch. 9, § 7.
2 Ortolan, I, p. 146. See also Wheaton, p. 272, § 190.
3 Grotius, L. II, C. III, § 14.
4 Ortolan, I, p. 149; Bluntschli, Buch IV, § 310.
5 Vattel, l, I. Ch. XXIII, § 292.
6 *Id.*; Twiss, § 174.

to all nations, or to several, that nation which possesses the strait cannot refuse passage thereon to the others, provided that such passage be innocent and without danger to her. In refusing it without just reason, she would deprive that nation of an advantage which is accorded to her by nature; and still further, the right of such passage is a residue of the primitive common rights." [1]

Pomeroy, however, rightly observes that "Any apparent difficulty or discrepancy will vanish when we consider the various kinds and degrees of rights which a nation may exercise over such waters. * * It can hardly be said of any such strait, even though it be so wide as not to be commanded from the shores, that the right to fish, or to traverse with armed ships, as well as with ships of commerce, is given by the general law to all peoples; while at the same time, it can be said of few or none, that, independent of convention, the innocent use for purposes of traffic and intercommunication is, or may be, forbidden." [2]

We derive therefore from all this discussion the principle that a nation owning both sides of a strait connecting two free seas, has the property in or dominion over such strait; subject, however, to an easement of passage, or right of way in other nations.

D.—*Marginal Belt.*

I. IN GENERAL.

A nation has always been deemed to command so much of the open sea off its coast-line as it could protect

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[1] Twiss, § 174.
[2] § 139.

from the shore. In early days, therefore, this limit was found in the longest stone's-throw or the farthest flight of an arrow.[1] A further application of this principle of limitation, "Potestatem terrae finiri, ubi finitur armorum vis,"[2] eventually increased the distance to cannon-range. At the time of the growing recognition of International Law in the seventeenth and early eighteenth century when the writers discussed and fixed this limit, cannon-range happened to be three marine miles. Thus for a time the two terms, three miles and cannon-range, were equivalents. But a precise limit having once been adopted, International Law was loath to leave it; and it has not since succeeded in totally divorcing itself from it. Although recognized to-day as arbitrary, this limit of three miles has the merit of precision, and has been sanctioned in many instances by laws and treaties. Let Mr. Seward be the exponent of this sentiment:

"The publicists rather advanced towards than reached a solution when they laid down the rule that the limit of the force is the range of a cannon-ball. The range of a cannon-ball is shorter or longer according to the circumstances of projection, and it must be always liable to change with the improvement of the science of ordnance. Such uncertainty upon a point of jurisdiction or sovereignty would be productive of many and endless controversies and conflicts. A more practical limit of natural jurisdiction upon the high seas was indispensably necessary, and this was found, as the undersigned thinks, in fixing the limit at three miles from the coast."[3]

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1 Bluntschli, Buch IV, § 302.

2 Bynkershoek, De dom. maris, cap. 2

3 Let. to Mr. Tessara, Dec. 16, 1862; Wharton, § 32, p. 102.

But the distance of defense is still theoretically and in many instances practically the limit of the marginal belt.

The extremes between which the pendulum of opinion on this point has swung are twenty miles, the extent of human sight, and one sea league, the seventeenth century cannon-range. These are the greatest and the least distances which have ever gained any respectable assent among nations. [1]

Rayneval and certain old writers [2] are authority for the proposition that the horizon limits the jurisdiction of a nation over the bordering ocean. This, and the equally impracticable theory of Valin that the dominion of a country in the sea ceases only when one can no longer sound bottom,[3] may be dismissed as being without foundation—either in fact or reason. The bulk of authority firmly establishes the rule that jurisdiction extends as far as guns will carry.[4]

As already mentioned, the distance has been and always may be varied by specific law or agreement. An illustration of a precise limit thus fixed in excess of three miles, is the "Guadalupe-Hidalgo" treaty with Mexico of Feb. 2d, 1848, whereby the boundaries of the United States and Mexico were placed at a distance of three

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1 Let. Mr. Jefferson to M. Genet, Nov. 8, 1793; Wharton, § 32, p. 100.

2 Inst. Liv. II, ch. 9, § 10; Spanish Law of 1643 cited in ch. 2 of Bynkershoek.

3 Wheaton, p. 256, note citing Valin, Comm. sur l'Ordonance de 1681, liv. V, tit., I.; Woolsey, § 56, p. 68.

4 Wheaton, p. 255; Kent I, p. 158; Ortolan I, p. 152-158; Phil. I, § 198; Grotius L. II, cap. 3, § 13; Bynkershoek, De dom. maris, cap. 2; Vattel, l. I., ch. 23, § 289; Klüber, § 130; Martens Law of Nations, B. IV., ch. IV., § 10; Pomeroy, § 150; Bluntschli, Völkerrecht, Buch IV, § 303; § Hautefeuille, Vol. I, p. 57.

leagues from the coast.[1] But such an arrangement can affect no other than the contracting parties.[2]

On the other hand, the English act of 1833, and the Act of Congress in 1794,[3] have fixed the jurisdictional limit for Great Britain and the United States at one sea league or three marine miles.

Yet even in these cases where the sea-league is taken as the limit, there are some purposes for which the distance of defense must still be taken as the limit of jurisdiction. "The ground of the rule" (as to maritime jurisdiction of this character), says Field, shortly, "is the margin of sea within reach of the land forces or from which the land can be assailed."[4] No nation can afford to deprive itself of the power to protect its shore against marauders or, in case it is a neutral, against belligerent cannonade. France exercised this power in 1864, at the time of the sea duel between the "Kearsarge" and the "Alabama." "Nor does this reason apply exclusively to hostile operations," says Wharton. "We can conceive, for instance, of a case in which armed vessels of nations with whom we are at peace, might select a spot within cannon-range of our coast for the practice of their guns. A case of this character took place not long since, in which an object on shore was selected as a point at which to aim, for the purpose of practicing, projectiles to be thrown from the cruiser of a friendly power. Supposing such a vessel to be four miles from the coast, could it be reasonably maintained that we have no police jurisdiction over

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1 Let. Mr. Fish, Sec. of State, to Sir Edward Thornton, Jan. 22, 1875; Wharton, § 32, p. 105.

2 Id., citing Let. Mr. Buchanan, Sec. of State, to Mr. Bankhead, Aug. 19, 1848.

3 Act of June 5, 1794, ch. 50, sect. 6, Laws of U. S., Vol. II, p. 427.

4 Field Int. Code, 2 Ed., § 28.

such culpable negligence? Or could it be reasonably maintained that marauders, who at the same time would not be technically pirates, could throw projectiles upon our shores without our having jurisdiction to bring them to justice? The answer to such questions may be drawn from the reason that sustained a claim for a three-mile police belt of sea in old times. This reason authorizes the extension of this belt for police purposes to nine miles, if such be the range of cannon at the present day. This, it should be remembered, does not subject to our domestic jurisdiction all vessels passing within nine miles of our shores, nor does it by itself give us an exclusive right to fisheries within such a limit. * * For the latter purposes, the three-mile limit is the utmost that can be claimed." [1]

2. THE HOVERING ACTS.

Another instance of the over-stepping of this sea-league bound are the so-called "hovering acts." Great Britain passed such an act in 1736;[2] the United States in 1799.[3] They provide substantially "for certain revenue purposes, a jurisdiction of four leagues from the coasts, by prohibiting foreign goods to be transhipped within that distance without payment of duties." [4] The United States law on the subject is found at § 2760 of the Revised Statutes:

"The officers of the revenue cutters shall * * go on board all vessels which arrive within the United

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1 Wharton, § 32, p. 114.

2 9 Geo. II, cap. 35, see Wharton, § 32, p. 109.

3 Act of March 2d, 1799, ch. 128, sect. 99, Vol. III, Laws of U. S., p. 226.

4 Wheaton, § 179.

States or within four leagues of the coast thereof, if bound for the United States, and search and examine the same, and every part thereof, and shall demand, receive and certify the manifests required to be on board certain vessels, shall affix and put proper fastenings on the hatches and other communications with the hold of any vessel, and shall remain on board such vessels until they arrive at the port or place of their destination."

Here then is presented a conflict of municipal with international law. The analogy between it, and the present similar conflict in the Behring Sea, renders it peculiarly important.

The real explanation of the validity of such a revenue regulation is found in the language of Mr. Fish, while Secretary of State, 1875: "Although the Act of Congress was passed in the infancy of this Government, *there is no known instance* of any complaint on the part of a foreign Government of the trespass by a commander of a revenue cutter upon the rights of its flag under the law of nations." [1]

Is not acquiesence on the part of other nations, then, a condition precedent to the legality of such an Act? And is this not virtually a confession that such a regulation can be nothing more than municipal, and must never be allowed to trench upon the rights of other nations? Such a view seems borne out by an incident which occurred shortly after. Mexican officials attacked United States merchant vessels, for breach of the Mexican revenue laws, at a distance of more than three miles from

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1 Let. to Sir Edward Thornton, Jan. 22, 1875; Wharton, § 32 p. 105.

the shore. This was styled by Secretary Evarts, an international offense. [1]

Phillimore is very positive in support of this view:

"It cannot be maintained as a sound proposition of international law that a seizure for purposes of enforcing municipal law can be lawfully made beyond the limits of the territorial waters, though in these *hovering* cases judgments have been given in favor of seizures made within a limit fixed by municipal law, but exceeding that which has been agreed upon by international law. Such a judgment, however, could not have been sustained if the foreign States whose subjects' property had been seized, had thought proper to interfere." [2]

Dana says: "It will not be found that, in later times, the right to make seizures beyond such waters has been insisted upon against the remonstrance of foreign States." But he goes still farther and denies "that a clear and unequivocal judicial precedent now stands sustaining such seizures when the question of jurisdiction has been presented." [3]

The explanation of such acquiescence on the part of other nations is that "the sovereign whose flag has been violated waives his privilege, considering the offending ship to have acted with *mala fides* towards the other State with which he is in amity, and to have consequently forfeited any just claim to his protection." [4]

Accordingly, a State executes these extra-territorial enactments at its "peril," hoping for ratification by

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1 Let. to Mr. Foster, Apl. 19, 1879; Wharton, § 32, p. 106.

2 I, § 198.

3 Wheaton, § 179, note.

4 Report of Dr. Twiss to the Sardinian Gov't. in the Cagliari case; Wharton, § 32, p. 111.

other nations from "motives of comity." [1] For "it cannot now be successfully maintained either that municipal visits and search may be made beyond the territorial waters, for special purposes, or that there are different bounds of that territory for different objects. * * In later times it is safe to infer that judicial as well as political tribunals will insist on one line of marine territorial jurisdiction for the exercise of force on foreign vessels, in time of peace, for all purposes alike." [2]

3. THE DOCTRINE OF HEADLANDS.

There is, however, an open place in all that has thus far been said concerning the marginal belt of jurisdiction. Shall we say with Secretary Bayard "that the seaward boundary of this zone of territorial waters follows the coast of the mainland, extending where there are islands so as to place around such islands the same belt. This necessarily excludes the position that the seaward boundary is to be drawn from headland to headland, and makes it follow closely, at a distance of three miles, the boundary of the shore of the continent or of adjacent islands belonging to the continental sovereign." [3]

Or shall we take to be true what Martens says on the subject? "A fictitious line is usually drawn from one promontory to another, and this is taken as the point of departure for the cannon range; this practice also applies to small bays, gulfs of a great extent being assimilated

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1 Wheaton, § 179, note.

2 Wheaton, p. 260, note.

3 Let. to Mr. Manning, Sec'y of Treas., May 28, 1886; Wharton, § 32, p. 107.

to the open sea." [1] A doctrine by which, as Pomeroy lucidly puts it, "all the rest of the land is treated as though extended out as far as these promontories." [2]

In other words, shall we accept or reject the doctrine of "headlands"?

When drawing up a code of International Law in 1872 for general adoption, Field drafted the following provision to cover this point:

"Where bays, straits, sounds or arms of the sea, are enclosed by headlands not more than six leagues apart, such limits extend three leagues outward from a line drawn between the two headlands." [3]

Chancellor Kent takes the following extreme position:

"Considering the great extent of the line of the American coasts, we have a right to claim, for fiscal and defensive regulations, a liberal extension of maritime jurisdiction; and it would not be unreasonable, as I apprehend, to assume for domestic purposes connected with our safety and welfare the control of waters on our coasts, though included within lines stretching from quite distant headlands—as, for instance, from Cape Ann to Cape Cod, and from Nantucket to Montauk Point, and from that point to the capes of Delaware, and from the South cape of Florida to the Mississippi. * * *

"There can be but little doubt that as the United States advance in commerce and naval strength, our Government will be disposed more and more to feel and acknowledge the justice and policy of the British claim

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1 Martens' Précis. Vol. i, p. 143; So Hautefeuille, Droit des Nats. Neutr., I, p. 59.

2 Pomeroy. § 151.

3 Vol. I, § 28.

to supremacy, over the narrow seas adjacent to the British Isles, because we shall stand in need of similar accommodation and means of security." [1]

To be sure, the context makes it clear that the learned Chancellor had particularly in mind the right to investigate the nationality of an armed vessel hovering "on our coasts," rather than a proprietary right such as that of exclusive fishing. Yet it is strange that Dr. Phillimore should have quoted this passage as indicative of American opinion on this point.[2] For it has been repeatedly disclaimed by the highest American authorities. President Woolsey declares: "But such broad claims have not, it is believed, been much urged, and they are out of character, for a nation that has ever asserted the freedom of doubtful waters, as well as contrary to the spirit of more recent times. [Moreover, the United States in the 'headland question' during its fishery disputes with Great Britain, has maintained the contrary]." [3] While Pomeroy as unhesitatingly asserts: "From the main propositions and doctrines in this extract of Chancellor Kent, I, as an American lawyer and citizen, must emphatically dissent. * * I should add that these pretensions on the part of our government seem to have been abandoned." [4]

The drift of modern opinion on this question is indicated by the attitude of England. Immemorially she has been committed to the doctrine of the "King's Chambers" so called; that is, she has extended her jurisdiction on her own coasts to a line drawn from headland to headland,

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1 Commentaries, Vol. I, pp. 30–31.

2 I, § 201.

3 Int. Law, § 60, p. 77.

4 Pomeroy, § 157.

so as to include bays and river outlets.[1] So vehement and constant has been the opposition to this claim from other nations that she has hesitated latterly to insist upon it or to extend it to her colonial possessions. In 1839, she concluded a fisheries treaty with France,[2] by the terms of which it was "equally agreed that the distance of three miles fixed as the general limit for the exclusive right of fishing upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland."[3]

The treaty of 1818, between Great Britain and the United States, after enumerating certain limits of free fishing, provided that "the United States * renounce forever any liberty heretofore enjoyed or claimed by the inhabitants thereof, to take, dry, or cure fish, on or within three marine leagues of the coasts, bays, creeks or harbors of his Britannic Majesty's dominions in America not included within the above-mentioned limits."[4]

Difficulties arising in 1849 as to the construction of this article, owing to its alleged non-observance by United States citizens, the British Law Officers were consulted.[5] They gave as the true construction that "the prescribed distance of three miles is to be measured from the headlands or extreme points of land, next the sea or coast, or of the entrance of bays or indents of the coast, and that consequently no right exists on the part of American citizens to enter the bays of Nova Scotia,

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1 Phil. I, § 200; Woolsey, § 60, p. 76.

2 Wheaton, p. 260.

3 Treaty of 3rd of Aug. at Paris, Martens' N. R. XVI., pp. 956-7.

4 Annual Reg, Vol. xciv (1852), pp. 295-6.

5 Phil. I, § 196.

there to take fish, although the fishing, being within the bay, may be at a greater distance than three miles from the shore of the bay, as we are of opinion that the term 'headland' is used in the treaty to express the part of the land we have before mentioned, including the interior of the bays and the indents of the coasts." [1]

Nevertheless, the jurisdictional line thus drawn, must be regarded as resting more on the precise words of the treaty, "within three marine leagues of any of the coasts, bays" &c., than on any doctrine of headlands. Besides, this decision was given on the supposition that the word "headland" occurred in the treaty; whereas, as Sir Robert Phillimore has pointed out, it does not. He accounts for this curious error by saying that "the Law Officers probably gave their opinion on a statement of the colonists in which the word did occur." [2] But the essence of the headland doctrine is, that it applies exactly there where no mention is made of headlands and no precise method of drawing the line of marginal jurisdiction is provided. For these reasons, this interpretation put upon the fisheries treaty of 1818, cannot be cited as an instance of the English headland doctrine.

The rights under this treaty were extended in 1854; but, in 1865, they were abrogated by the United States in the exercise of a power reserved to it in the treaty.[3] On May 14, 1870, the Provincial Minister of Marine and Fisheries, Mr. Peter Mitchell, re-asserted, the headland claim off these coasts, now without treaty sanction. Lord Granville, British Foreign Secretary, instantly tele-

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1 Ann. Reg., Vol. xciv (1852), pp. 296-7.

2 I, § 196, note.

3 Phil. I, § 196.

graphed: "Her Majesty's Government hopes that the United States fishermen will not be, for the present, prevented from fishing, except within three miles of land, or in bays which are less than six miles broad at the mouth." [1]

The history of the headland doctrine, therefore, warrants the conclusion of Dr. Wharton:

"It cannot be asserted as a general rule that nations have an exclusive right of fishery over all adjacent waters to a distance of three marine miles beyond an imaginary line drawn from headland to headland. This doctrine of headlands is new, and has received a proper limit in the convention between France and Great Britain on the 2d of Aug., 1839." [2]

II. When the Shores belong to more than one Nation.

There is a singular uncertainty among the writers as to whether and how a division of the possession of the shores among two or more nations affects the close character of bays, enclosed seas and straits. Puffendorf declares sweepingly: "Quod si autem diversi populi fretum, aut sinum accolant, eorum imperia pro latitudine terrarum ad medium usque ejusdem pertinere intelligentur." [3] Twiss [4] and Phillimore [5] repeat this statement of Puffendorf on his authority in regard to straits. But

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1 Wharton, § 29, p. 76.
2 Digest, § 29, p. 76.
3 L. IV, c. IV, § 8.
4 § 174.
5 I, § 189.

we have good authority for thinking that the jurisdiction of a nation over a strait of which it owns but one shore, does not extend beyond three miles or cannon-shot.[1] There is certainly no reason why the narrow marginal belt allotted to national ownership should be any greater in such a strait than in the open sea.

As to bays and enclosed seas, however, the view of Puffendorf is probably the correct one. Yet Dr. Twiss speaks of the Black Sea as being an instance of a closed sea "whilst its shores were in the exclusive possession of the Ottoman Porte."[2] He thereby implies that the *exclusive* possession of the Porte was the reason for its close character.

Accordingly, the authorities seem to permit the conclusion that when opposite shores of straits are owned by more than one nation, territorial jurisdiction extends three miles only. But when the shores of bays and enclosed seas belong to different countries, the status of these bodies of water is assimilated to that of lakes. Jurisdiction extends to the middle line; but the bordering countries and, when these bodies of water communicate with the open sea, all countries, have the right of free navigation.[3]

On this point, Field proposes the following regulations:

"§ 31. The limits of national territory, bounded by a lake, or other inland water, not being a stream, extend outward to a straight line drawn from the points at which

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1 Pomeroy, § 139; Klüber, § 130.

2 § 174.

3 Bluntschli, IV, §§ 301, 305 and 306.

such territory touches the land of other nations on the shore, at low-water mark; except where such line would fall within less than three marine leagues of the shore of another nation."

"§ 32. Where the line mentioned in the last article would fall within less than three marine leagues of the shore of another nation, at low-water mark, it must so deflect as to run that distance from such shore, unless the distance between the opposite shores is less than six marine leagues, in which case the boundary line runs equidistant from the two shores." [1]

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[1] International Code.

CHAPTER VII.

The Behring Sea not within the Exceptions to the Rule of Mare Liberum.

The application of these principles of international law to the Behring Sea, permits but one conclusion. It is a free sea. A strait it obviously is not; nor does the marginal belt jurisdiction include the fishing ground of the Canadian Sealers. In the character of an enclosed sea, it is deficient in the necessary complete enclosure by land. For not only is the Behring Strait 36 miles wide, and the distance between many of the islands forming the southern boundary of this sea far in excess of that, but the distance between the last island of the Aleutian chain and the nearest Russian island of the Commander group is 183 miles.

Again, regarded as a bay or gulf, the Behring Sea fails to enter the category of closed seas. Waiving all physico-geographical objections to such a classification, it still lacks two of the essentials of such a sea, i. e. defensibility of the entrance (if indeed it can be said to have any entrance) and possessibility. At its *quasi* entrance, the navies of the world might ride abreast and yet be out of each others' sight. The mere name of bay or gulf does not necessarily carry with it the idea of possessibility, and International Law, when importuned to accord such a character to the Behring Sea, cries out with Vattel:

"Mais je parle des baies et détroits de peu d'étendue, et non de ces grand espaces de mer, auxquels on donne quelquefois ces noms, tels que la baie de Hud-

son, le détroit de Magellan, sur lesquels l'empire ne saurait s'étendre, et moins encore la propriété." [1]

If sovereignty over the Behring Sea were its sole ground of defense, the following official criticism of its course of action by the Canadian Privy Council would be unanswerable by the United States :

"It does not appear necessary to insist at any great length that the conditions attaching to *Maria clausa* can not by any possibility be predicated of Behring Sea, and that the seizure of Canadian vessels at a distance of over 100 miles from the mainland, and 70 miles from the nearest island, constitutes a high-handed extension of maritime jurisdiction unprecedented in the law of nations." [2]

The verdict of International Law so far as the controversy involves a claim to national marine jurisdiction, is found in the latest edition of Woolsey's celebrated work on International Law, published in 1891.

"The recent controversy between Great Britain and the United States involving the right of British subjects to catch seals in North Pacific waters, appears to be an attempted revival of these old claims to jurisdiction over broad stretches of sea. That an international agreement, establishing a rational close season for the fur seal is wise and necessary, no one will dispute. But to prevent foreigners from sealing on the high seas, or within Kamschatkan Sea (which is not even enclosed by American territory, its west and northwest shores being Russian), is as unwarranted as if England should warn fishermen of other nationalities off the Newfoundland Banks."[3]

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1 Vattel, L. I, Ch. XXIII, § 291.

2 No. 117, Report approved by Gov. Gen., 29 Nov., 1886.

3 § 59, p. 73.

CHAPTER VIII.

Mare Liberum in American History.

Before quitting this branch of the subject, American history should be searched to find how far the United States has committed itself to the principles just laid down and in what application. Old world precedents weigh lightly with a certain class of Americans; the reply being, that it is the part of a progressive country, like the United States, to break loose from the chains of old world ideas and to set the fashion for the world. A precedent is never a parallel; at best it argues by analogy. The precedent most directly in point is but an approximate parallel. But while the precedent set by another nation may be lightly distinguished and so disregarded, the precedent out of its own history will be cogent upon a country on pain of self-stultification. The ghost of its national past will not down from troubling the repose of the United States, so long as it preaches or practices any different doctrine of the high seas than national "hands off."

When, in 1855, the United States was invited to participate in the European Conference to adjust the gross sums which should be paid to Denmark for the right of passage through the Sound and the two Belts, President Pierce declined to have anything to do with such payment "because," said he, "it is in effect the recognition of the right of Denmark to treat one of the great maritime highways of nations as a *close sea*, and prevent the navigation of it as a privilege, for which tribute may be imposed upon those who have occasion to use it." [1]

[1] Pierce's 3d Annual Message, 1855; Wharton, § 29, p. 77.

In 1862, when Spain insolently pushed her claim to an extended jurisdiction around the Island of Cuba, Secretary Seward's forcible response was:

"It cannot be admitted, nor, indeed, is Mr. Tessara understood to claim, that the mere assertion of a sovereign, by an *act of legislation*, however solemn, can have the effect to establish and fix its external maritime jurisdiction. * * * He cannot, by a mere decree, extend the limit and fix it at six miles, because, if he could, he could in the same manner, and upon motives of interest, ambition or even upon caprice, fix it at ten, or twenty, or fifty miles, without the consent or acquiescence of other powers which have a common right with himself in the freedom of all the oceans. Such a pretension could never be successfully or rightfully maintained."[1]

This language is peculiarly applicable to the Behring Sea claims of the United States, because, unless we concede that they were derived from Russia, they rest solely on an act of Municipal Law.

In 1871, the Secretary of State, Mr. Fish wrote to the American Minister at Constantinople: "This Government is not disposed to prematurely raise any question to disturb the existing control which Turkey claims over the straits leading into the Euxine. * * But while this Government does not deny the existence of the usage * * the President deems it important to avoid recognizing it as a right under the laws of nations."[2]

This same view with regard to sovereignty over a strait finds more determined expression in a letter from

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1 Let. to Mr. Tessara, Aug. 10, 1863; Wharton, § 32, p. 103.

2 Let. to Mr. MacVeagh, May 5; Wharton, § 29, p. 79.

Mr. Evarts, Secretary of State in 1879: "The Government of the United States will not tolerate exclusive claims by any nation whatsoever to the Strait of Magellan, and will hold responsible any Government that undertakes, no matter on what pretext, to lay any impost or check on the United States commerce through those straits."[1]

In 1875, a question arising as to Russia's authority to grant licenses for the use of her contiguous seas, Mr. Fish yet more pointedly said:

"There was reason to hope that the practice which formerly prevailed with powerful nations, of regarding seas and bays, usually of large extent, near their coast, as closed to any foreign commerce or fishery not specially licensed by them, was, without exception, a pretension of the past and that no nation would claim exemption from the general rule of public law which limits its maritime jurisdiction to a marine league from its coast. We should particularly regret if Russia should insist on any such pretension."[2]

And finally, the latest official word on this matter. In 1886, warning was given by the Canadian authorities to American fishermen not to carry on their occupation within the waters of the Bay of Chaleurs, a bay which measures about eighteen miles at its mouth. In a dispatch of June 14th, Secretary Bayard stigmatized such action as a "wholly unwarranted pretension of extra-territorial authority" and an "interference with the unquestionable rights of the American fishermen to pur-

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1 Let. Mr. Evarts to Mr. Osborn, Jan. 18, 1879; Wharton, § 29, p. 80.

2 Let. Mr. Fish, Sec. of State, to Mr. Boker, Dec. 1, 1875; Wharton, § 32 p. 106.

sue their business without molestation at any point not within 3 marine miles of the shore." [1]

"It is," to use Lord Landsdowne's comment, "worth while to contrast" these indignant remonstrances of Secretary Bayard with "the claims now urged by the Government of the United States to exclusive control over a part of the Pacific Ocean, the distance between the shores of which is, as was pointed out by Mr. Adams, in 1822, not less than 4,000 miles." [2] "What," queried a newspaper, "would be said if the British undertook to prevent an American whaler from entering Hudson Bay, or traversing the western half of that arm of the Atlantic Ocean which leads to it? Maritime law and international are the same, whether on the Atlantic or the Pacific, and there is certainly something grotesque in the sight of hundreds of American fishermen hovering on the Canadian Atlantic coast just beyond the 3-mile limit, and claiming to enter all bays more than 3 miles wide at the mouth, and fish, while on the Pacific Canadian vessels are captured 300 miles from the mainland, and the claim is made that a bay more than 1,000 miles wide at the mouth shall be a closed sea to them." [3]

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1 No. 117. Let. of Lord Lansdowne to Mr. Stanhope, Nov. 29, 1886.

2 *Id.*

3 *Brooklyn Eagle.*

CHAPTER IX.

The International Police Power Conferred by the Exigencies of Pelagic Sealing, and its Interlocutory Exercise by the United States.

"Much learning has been expended upon the discussion of the abstract question of the right of *mare clausum*. I do not conceive it to be applicable to the present case.

"Here is a valuable fishery, and a large and, if properly managed, permanent industry, the property of the nations on whose shores it is carried on. It is proposed by the colony of a foreign nation, in defiance of the joint remonstrance of all the countries interested, to destroy this business by the indiscriminate slaughter and extermination of the animals in question, in the open neighboring sea, during the period of gestation, when the common dictates of humanity ought to protect them, were there no interest at all involved. And it is suggested that we are prevented from defending ourselves against such depredations because the sea at a certain distance from the coast is free.

"The same line of argument would take under its protection piracy and the slave trade when prosecuted in the open sea, or would justify one nation in destroying the commerce of another by placing dangerous obstructions and derelicts in the open sea near its coasts. There are many things that cannot be allowed to be done on the open sea with impunity, and against which every sea is *mare clausum*; and the right of self-defense as to person and property prevails there as fully as else-

where. If the fish upon the Canadian coasts could be destroyed by scattering poison in the open sea adjacent with some small profit to those engaged in it, would Canada, upon the just principles of international law, be held defenseless in such a case? Yet that process would be no more destructive, inhuman, and wanton than this.

"If precedents are wanting for a defense so necessary and so proper, it is because precedents for such a course of conduct are likewise unknown. The best international law has arisen from precedents that have been established when the just occasion for them arose, undeterred by the discussion of abstract and inadequate rules." [1]

Much pent-up feeling will find outlet in these forcible words of Mr. Phelps, late United States Minister to England, in which, Mr. Blaine informs the British Government, the President "finds his own views well expressed." [2]

The argument as to piracy and the slave trade, which had found previous expression in Secretary Blaine's letters, [3] seems to us fitly answered by Lord Salisbury:

"The pursuit of seals in the open sea, under whatever circumstances, has never hitherto been considered as piracy by any civilized state. Nor, even if the United States had gone so far as to make the killing of fur-seals piracy by their municipal law, would this have justified them in punishing offenses against such law committed by any persons other than their own citizens outside the territorial jurisdiction of the United States.

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1 Let., Mr. Phelps to Mr. Bayard, Sept. 12, 1888, quoted in Mr. Blaine's letter to Sir Julian Pauncefote, Dec. 17, 1890,-1891.

2 Let. of Mr. Blaine last referred to.

3 Let. to Sir Julian Pauncefote, Jan. 22, 1890,-No. 9, 1890.

"In the case of the slave trade, a practice which the civilized world has agreed to look upon with abhorrence, the right of arresting the vessels of another country is exercised only by special international agreement. * *" [1]

The analogy drawn between seal poaching and the wanton scattering of poison among the fish of the Canadian coast of the use of dynamite, seems to us to obliterate the distinction between use and abuse. The time-honored legal maxim, *sic utere tuo ut alienum non lædas*, allows my neighbor to build his house so high as to shut out my view, but forbids him to dig so that my land caves in.

But Mr. Phelps' strong plea for the actual safety of the Behring Sea seal fishery demands attention. The exigencies of that fishery make out a strong case for international protection and for single nation interference in its behalf. Although the precise damage inflicted upon the seal industry by deep sea fishing is a matter of dispute between the two Governments,[2] and Great Britain is unwilling to acknowledge that any restrictions upon it are necessary, [3] yet the following facts seem to be sufficiently vouched for by experts to justify the United States in relying and acting upon them.

Connecting Behring Sea with the Pacific Ocean are the passes which separate the islands of the Aleutian chain. Through these, in the late spring, draw the returning hordes of the fur seal after their wintering in the warmer waters of the Pacific. "The convergence and

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1 Let. Salisbury–Pauncefote, May 22, 1890,-No. 14, 1890.

2 Lets. Blaine–Pauncefote, March 1, 1890; Pauncefote–Blaine, March 9, 1890; and Pauncefote–Blaine, April (received the 30th,) 1890. Nos. 11, 12 and 13, 1890, with enclosures.

3 Let. Pauncefote–Blaine, April (30th,) 1890, No. 13, 1890.

divergence of these watery paths of the fur seal to and from the Seal Islands resembles the spread of the spokes of a half wheel—the Aleutian chain forms the felloe, while the hub into which these spokes enter is the small Pribyloff group.[1] So that upon the Seal Islands of the Pribyloff group, St. George and St. Paul, is cast nearly the whole mass of these returning fur seal millions. Here then are their natural rookeries.

In these islands the fur seal is obliged annually to haul out for the purpose of breeding and shedding its pelage. The male seals or bulls require little food during the five or six summer months, sustaining existence on the blubber secreted beneath their skin. They, therefore, remain ashore watching the rookeries. Thus the greater part of the seals found during the summer at any distance from the islands are females in search of food for themselves and their young.

Great discrimination is exercised and enforced by the Alaska Company in the killing of these seals. Only the young bulls are permitted to be slain; they are driven inland from the sandy parts of the islands whither the old bulls have driven them, and clubbed in order that their skins may not be perforated.

On the contrary, if these seals are hunted in the sea, not only is discrimination impossible, but nearly one out of every three so slaughtered, sinks and is lost. Besides, as we have said, only females frequent these seas at this season.[2]

We need not point out the utter ruin which thus threatens this valuable industry. Anywhere from 3 to 100

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1 No. 76. Report of Hon. Henry W. Elliott of the Smithsonian Institute to Mr. Bayard, Dec. 3, 1887.

2 Mr. Elliott's Report.

miles south of the Seal Islands, the pelagic sealer "has a safe and fine location from which to shoot, to spear, and to net these fur-bearing amphibians, and where he can work the most complete ruin in a very short time." Continues Mr. Elliott, "with gill nets, under run by a fleet of sealers in Behring Sea, across these converging paths of the fur seal, anywhere from 3 to 100 miles southerly from the Seal Islands, I am extremely moderate in saying that such a fleet could and would utterly ruin, the fur seal rookeries of the Pribyloff Islands in less time than three or four short seasons. * * * Open these waters of Behring Sea to unchecked pelagic sealing, then a fleet of hundreds of vessels—steamers, ships, schooners and what not—would immediately venture into them bent upon the most vigorous and indiscriminate slaughter of these animals. A few seasons then of the greediest rapine, then nothing left of those wonderful and valuable interests of the public which are now so handsomely embodied on the Seal Island."

The great need of immediate regulation is apparent. The history of seal fisheries in other parts of the world ought to serve as a warning. Whereas, formerly hundreds of thousands of seals were annually taken off the coasts of Chili, the South Pacific Islands, Southern Africa, and the Falkland Islands, through indiscriminate slaughter, the whole annual catch in those localities has now been reduced to a few thousand. In some places it has led to the entire destruction of the rookeries. So that out of 192,000, which is the average yield of the fur seal fisheries of the world since 1880, 136,000 or nearly three-quarters are captured on the islands of the Pribyloff and Commander groups; and 25,000 more are taken out of the adjacent waters by the British and American

sealing fleets. Mr. A. Howard Clark, who furnished the statistics for the article on Seal Fisheries in the Encyclopædia Britannica, says :

"There can be no question concerning the advisability of regulating the number of animals to be killed and the selection of such animals as will not interfere with the breeding of the species."[1]

While such a partisan authority as the Inspector of Fisheries for British Columbia reports that a repetition of the enormous catch in 1886–7 of 40,000 to 50,000 fur seals by schooners from San Francisco and Victoria, "with the increase which will take place when the vessels fitting up every year are ready, will soon deplete our fur seal fishery, and it is a great pity that such a valuable industry could not in some way be protected."[2]

Now the exigencies of a fishery might suggest the right of a nation to interfere with the acts of other nations beyond its boundaries on two theories. First, this right might be asserted as an attribute of ownership of the fishery. Second, it might be asserted as the international privilege and duty of the nearest and most interested nation.

Mr. Lothrop, while United States Minister to Russia, communicated to his Government a plausible theory of ownership, which he had heard applied in Russia to the fisheries off the coasts of northeastern Asia :

"The seal fishery on our Behring coasts is the only resource our people there have ; it furnishes them all the necessaries of life ; without it they perish. Now international law concedes to every people exclusive

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[1] No. 76. Review of the fur seal fisheries of the world in 1887.

[2] Report of Thomas Mowat.

jurisdiction over a zone along its coast, sufficient for its protection ; and the doctrine of the equal rights of all nations, on the high seas, rests on the idea that it is consistent with the common welfare, and not destructive of any essential rights of the inhabitants of the neighboring coasts. Such common rights, under public law, rest on general consent, and it would be absurd to affirm that such consent had been given, where its necessary result would be the absolute destruction of one or more of the parties. Hence, the rule cannot be applied blindly to an unforseen case, and these alleged common rights must rightfully be limited to cases where they may be exercised consistently with the welfare of all. Behring Sea partakes largely of the character of an enclosed sea ; two great nations own and control all its enclosing shores. It possesses a peculiar fishery, which, with reference to its preservation, can only be legitimately pursued on land, and even there only under strict regulations. To allow its understrained pursuit in the open waters of the sea is not only to doom it to annihilation, but, by necessary consequence, to destroy all its coast inhabitants. If this result is conceded, it follows that the doctrine of common rights can have no application to such a case." [1]

But as Mr. Angell [2] says of this reasoning: "We can hardly assert with much plausibility that the members of the Alaskan Commercial Company, which has the monopoly of seal-catching on, and near, the Pribyloff Islands, can plead, *in forma pauperis*, for protection on grounds of charity." The extinction which indiscriminate

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1 No. 103. Let. to Mr. Bayard, Dec. 8, 1887.

2 President of the University of Michigan. *Forum*, Nov., 1889. "American Rights in Behring Sea."

capture of the fur seal threatens "deplorable as it may be, would furnish a most flimsy excuse to a Government whose regulations of the industry in Alaskan waters is prompted not by philanthrophy, but by strictly mercenary consideration." [1]

Vattel speaks thus of national appropriation of neighboring fisheries:

"The various uses of the sea near the coasts render it very susceptible of property. It furnishes fish, shells, pearls, amber, &c. Now, in all respects its use is not inexhaustible; wherefore, the nation to which the coasts belong, may appropriate to itself an advantage which nature has so placed within its reach, as to enable it conveniently to make itself master of it and to turn it to profit, in the same manner as it has been able to occupy the dominion of the land which it inhabits. Who can doubt that the pearl fisheries of Bahrem and Ceylon may lawfully become property? And though where the catching of (swimming) fish is the object, the fishery appears less liable to be exhausted, yet, if a nation has on its coast a particular fishery of a profitable nature, and of which it may render itself master, shall it not be permitted to appropriate to itself that natural benefit, as as an appendage to the country which it possesses * * ?" [2]

Dr. Twiss not only quotes the above with approval, but declares that the right of fishery "comes under different considerations of law from the right of navigation." For, says he: "The *usus* of all parts of the open sea in respect of navigation is common to all nations, but the *fructus* is distinguishable in law from

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1 Victoria, B. C., paper.

2 Droit des Gens, t. I, l. I, c. XXIII, § 287.

the *usus*, and in respect of fish, or zoophites, or fossil substances, may belong in certain parts exclusively to an individual nation."[1]

What he means, however, by "certain parts" of the sea, turns out to be something very conventional. "The practice of nations," adds he, "has sanctioned the exclusive right of every nation to the fisheries."—Where? "In the waters adjacent to its coasts to within the limits of its maritime jurisdiction." [2]

Twiss, therefore, neither himself contends nor construes Vattel to mean that a nation may take into its possession a fishery lying beyond the ordinary territorial jurisdiction.

If, on the other hand, Vattel in spite of his limiting words "on its coast" intended such extra-marginal fisheries, his reasoning had weight only so long as the inexhaustible nature of the sea was urged as an argument for its freedom. This, as we have already shown, is no longer done by the best jurists.[3] and I will add one more illustration in the words of Calvo:

"Au point de vue pratique, celui de la pêche, par exemple, l'argument tiré de la prétendue immensité des mers n'a qu'une valeur relative, et conduirait, contrairement à la pensée de ceux qui le mettent en avant, à soutenir que l'océan est susceptible d'appropriation dans certains cas et qu'il ne l'est pas dans d'autres, qu'il peut à la fois, constituer un domaine collectif ou national et une propriété individuelle."[4]

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1 Twiss, § 182.

2 *Id.* and Wheaton, Part II, Ch. 4, § 5, citing Azuni, t. I, c. II, art. 8.

3 Wheaton, p. 269.

4 Vol. I, § 205.

But, further, Vattel is in perfect accord with the authorities on the subject in maintaining that the distance of defence limits the marine jurisdiction of nations.[1] In this fact may be found all-sufficient proof that he never intended by his words above-quoted to uphold the national possession of a fishery beyond that limit.

The distinct refusal of International Law to sanction the extension of national domain over a neighboring fishery cannot be more convincingly stated than on the authority of Bluntschli:

"The rich treasures of the sea are open to all humanity."[2]

Or on the more explicit authority of Calvo:

"Un intérêt maritime de premier ordre, l'exploitation des pêches côtières et des bancs d'huître ou d'autres coquillages, a dans certains parages maritimes fait étendre au delà de la zone de 3 milles le rayon de la mer dite territoriale. De pareilles dérogations aux principes universellement reconnus doivent strictement se renfermer dans la limite de l'objet spécial qui les a fait adopter; elles out besoin d'ailleurs pour devenir obligatoires d'être sanctionnées par des conventions expresses et écrites."[3]

If the United States is devoid of right to regulate seal fishing in Behring Sea beyond its jurisdictional limit on the ground of ownership of the extra-territorial fishery, still less does it possess such right by virtue of any ownership in the seal itself. We do not understand whether any such ground is actually relied upon by the

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1 L. I, C. 23, § 289; see above.

2 Buch IV, § 307.

3 § 201.

United States Government.[1] But we think that Lord Salisbury's statement of the law on that point, will meet with little opposition from those who are familiar with the qualifications of animals *feræ naturæ* at common law :

" Fur seals are indisputably animals *feræ naturæ*, and these have universally been regarded by jurists as *res nullius* until they are caught; no person, therefore, can have property in them until he has actually reduced them into possession by capture." [2]

The claim of Canada to wild ducks hatched in her territory after the birds had passed her boundary, would be as valid, says President Angell,[3] as the claim of ownership of seals, simply by reason of their short sojourn or even birth upon the Pribyloff Islands. To follow them into the broad Pacific with the claim to the ownership, is unsupported by law. But to meet them in the Aleutian Straits with the same claim, is unsupported by both law and fact. For where is the oracle which can declare of any one seal out of the migrating herd that it had ever before visited the Pribyloff Islands, and did not rather hail from either Copper or Behring Island of the Commander group.[4] If birth or sojourn upon the Pribyloff Islands constitutes seals United States property, birth or sojourn upon the Commander Islands constitutes them Russian property; and the *reductio ad absurdum* of the argument of seal ownership, would be the United States prohibiting Canadians from killing seals because they were Russian property.

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1 Let. Blaine–Pauncefote, April 14, 1891; published May 8, 1891.

2 Let. Salisbury–Pauncefote, May 22, 1890: No. 14, 1890.

3 *Forum, supra.*

4 " American Rights in Behring Sea," *supra.*

But, on the other hand, to protect a neighboring extra-territorial fishery in the name and for the sake of the world interest involved, rests on an entirely different claim of right. In such an act, there is no trace left of national pretension; it concedes to the civilized nations of the globe, common ownership. The protection of such a fishery is an international duty; its regulation an international task. To be sure, that duty should be assumed by an international conference, and that task performed by the concerted action of nations. But before such a regular administration of international justice could be felt, much time must elapse, and during this interval irreparable damage might be inflicted. Here, as in the protection of all rights and the prevention of all wrongs, a more immediate remedy is indispensable. In municipal law, the danger is averted by the interlocutory injunction. Such a remedy then there must needs be for the perfect preservation of public rights in International Law. The procedure in the case of the international interlocutory injunction must comply with the necessities of the situation. There is no permanent international tribunal to which an immediate application may be made. Therefore the event must justify the act; an appropriate international convention must subsequently ratify the infliction of the temporary injunction, or else in close analogy to municipal law, impose upon the nation administering such unwarranted remedy the payment of damages for the consequences of its rash act.

This temporary injunction will always be executed by the nation or nations most interested in the prevention of the wrong or most seriously injured by its continuance.

Does pelagic sealing in the Behring Sea present a

proper case for such an international interlocutory injunction; and is the United States authorized to intervene and has it in fact intervened to prevent the destruction of the Seal species as an international agent? Assuredly, yes. Seal fishing, and by reason of its almost sole survivorship, particularly the Behring Sea seal fishery, is a world interest; not only are all nations indirectly profited by its preservation, but England directly. "The entire business was * conducted peacefully, lawfully, and profitably—profitably to the United States, for the rental was yielding a moderate interest on the large sum which this Government had paid for Alaska, including the rights now at issue; profitably to the Alaskan Company, which, under governmental direction and restriction, had given unwearied pains to the care and development of the fisheries; profitably to the Aleuts, who were receiving a fair pecuniary reward for their labors, and were elevated from semi-savagery to civilization and to the enjoyment of schools and churches provided for their benefit by the Government of the United States; and, last of all, profitably to a large body of English laborers who had constant employment and received good wages." [1] Nearly all undressed fur seal skins were shipped to London; and it is estimated that their dressing and dyeing gave employment in that city to 10,000 people. Has the United States then not acted in the interest of these other nations as well as of itself?

If it be true that the United States, in the enforcement of a claim of ownership, has committed an offence against the national rights of Great Britain, it is equally

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[1] No. 9, 1890. Let. Blaine–Pauncefote, March 1, 1890.

true that Great Britain, by violating what the United States claims to be the apparent laws of prudent seal fishing, has committed an international offence. It is no reply on the part of Great Britain that she disputes these very laws and denies the necessity for any regulation. For the United States sincerely maintains the reverse. There is presented a clear-cut issue of fact; and pending its decision, it is not too much to ask that matters shall remain in *statu quo*. To allow the indiscriminate slaughter of seals pending an international investigation of the facts and pending international negotiations for the protection of the industry, might lead to the destruction of the subject matter of the dispute, and would be folly. Either the seal fishery must go unregulated, or be temporarily regulated by a power ready to undertake the duty. On this theory then the United States might properly play the role of international agent.

The attitude which the United States has assumed in this controversy is not wholly inconsistent with such a theory. It has, it is true, asserted national sovereignty over the waters of Behring Sea by derivation from Russia. But it has not relied exclusively upon such assertion. Mr. Blaine unmistakably points out a further reason for the policy of his Government:

"In the opinion of the President, the Canadian vessels arrested and detained in the Behring Sea were engaged in a pursuit that was in itself *contra bonos mores*, a pursuit which of necessity involves a serious and permanent injury to the rights of the Government and people of the United States. To establish this ground it is not necessary to argue the question of the extent and nature of the sovereignty of this Government over

the waters of the Behring Sea: It is not necessary to explain, certainly not to define, the powers and privileges ceded by His Imperial Majesty, the Emperor of Russia, in the treaty by which the Alaskan territory was transfered to the United States. The weighty considerations growing out of the acquisition of that territory, with all the rights on land and sea inseparably connected therewith, may be safely left out of view, while the grounds are set forth upon which this Government rests its justification for the action complained of by Her Majesty's Government."[1]

In reply to the protest of the British Government against the seizure of the Canadian fishing schooners, Mr. Blaine wrote:

"In turn, I am instructed by the President to protest against the course of the British Government in authorizing, encouraging, and protecting vessels which are not only interfering with American rights, in the Behring Sea, but which are doing violence as well to the rights of the civilized world." [2]

He proceeds not alone to set forth the vastness of the interests of the United States involved in the controversy, but alleges the larger welfare of mankind to be the concern of the United States. "In exterminating the species an article useful to mankind is totally destroyed in order that temporary and immoral gain may be acquired by a few persons." [3] He compares the Canadian destruction of seals to the use of dynamite among the fish colonies on the "Newfoundland banks;" and asks:

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1 No. 9, 1890. Let. Blaine-Pauncefote, Jan. 22, 1890.

2 No. 17, 1890. Let. Blaine-Pauncefote, May 29, 1890.

3 *Id.*

"Does Her Majesty's Government seriously maintain that the law of nations is powerless to prevent such violation of the common rights of man? Are the supporters of justice in all nations to be declared incompetent to prevent wrongs so odious and so destructive?

"In the judgment of this Government the law of the sea is not lawlessness. Nor can the law of the sea and the liberty which it confers and which it protects, be perverted to justify acts which are immoral in themselves, which inevitably tend to results against the interests and against the welfare of mankind. * * * The forcible resistance to which this Government is constrained in the Behring Seais, in the President's judgment, demanded not only by the necessity of defending the traditional and long-established rights of the United States, but also the rights of good government and of good morals the world over." [1]

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[1] *Id.*

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